Wednesday May 29 —

No. 672

TRANSCRIPT OF RECORD

Office - Supreme Court, U.S.
FILED
DEC 16
JOHN T. FEY, Clerk

UNITED STATES
COURT OF APPEALS

FIFTH CIRCUIT.

LIBRARY
SUPREME COURT, U.S.

No. 16,430

HAROLD BRANNON MAGNESS,

Petitioner,

versus

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition for Review of Decision of The Tax Court of the United States (District of Georgia).

(ORIGINAL RECORD: RECEIVED DEC. 17/56.)

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DOCKET ENTRIES.

DOCKET No. 55503.

HAROLD BRANNON MAGNESS,
Petitioner,

versus

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Appearances:
For Petitioner: Jas. W. Arnold, Esq., (Robt. L. Russell, Jr.)

1954
Dec. 8—Petition received and filed. Taxpayer notified. Fee paid.
Dec. 9—Copy of petition served on General Counsel.

1955
Feb. 4—Answer filed by General Counsel.
Feb. 4—Request for hearing in Atlanta, Ga. filed by General Counsel.
Feb. 10—Notice issued placing proceeding on Atlanta, Ga. calendar. Service of Answer and Request made.

1956
Feb. 13—Hearing set April 9, 1956, Atlanta, Georgia.
Apr. 9 & 10—Hearing had before Judge Rice on the merits, Filed at hearing—(Entry of Appearance of Robert L. Russell, Esq.) Briefs due 6/11/56. Replies due 6/26/56.

1956

Apr. 20—Transcript of Hearing 4/9/56 filed.

Apr. 20—Transcript of Hearing 4/10/56 filed.

June 7—Motion for extension of time to 6/26/56 to file brief, filed by Respondent. 6/11/56—Granted. Served 6/12/56.

June 11—Brief filed by petitioner. 7/10/56—Served.

June 19—Joint motion to reopen record to receive the attached Stipulation of facts, stipulation of facts lodged, filed.

June 25—Motion of June 19, 1956, is Granted—Served 6/27/56.

June 26—Motion for extension of time to 7/10/56 to file brief, filed by Respondent. 6/27/56—Granted. Served 6/28/56.

July 9—Brief filed by Respondent. 7/10/56—Served.

Aug. 31—Findings of Fact and Opinion filed, Judge Rice, Decision will be entered for the Respondent. Served 9/4/56.

Sept. 5—Decision entered, Judge Rice, Div. 12. Served 9/6/56.

Oct. 22—Motion to fix amount of Bond at $341.00, filed by Petitioner. Served 10/23/56.

Oct. 22—Order, fixing amount of Bond at $475.00, entered. Served 10/23/56.

Oct. 22—Bond in the amount of $475.00 approved and filed.

Oct. 23—Petition for Review by U. S. Court of Appeals for the Fifth Circuit, with assignments of error filed by petitioner.

Oct. 23—Proof of Service filed.

Oct. 23—Praecipe for Record, with proof of service thereon, filed by petitioner.

1956
Nov. 16—Certified copy of Order of Court of Appeals, 5th Circuit, directing that the original transcript of testimony, in lieu of a Narrative statement of evidence, be made a part of the transcript of record, original exhibits to be transmitted 10 days prior to hearing, filed.

PETITION.

Filed Dec. 8, 1954

The Tax Court of the United States.

Harold Brannon Magness, Petitioner,
vs. Docket No. 55503.
Commissioner of Internal Revenue, Respondent.

Now comes the petitioner in the above entitled cause, and within the time prescribed by law in such cases and petitions this Hon. Court for a redetermination of the deficiency set forth by Respondent in his notice of deficiency dated September 20th, 1954, "A:R-SN:JPH, Internal Revenue Service, Atlanta 3, Georgia, a copy of said notice is hereto attached, marked Exhibit "A" and made a part hereof. As a basis of this proceeding, petitioner alleges as follows:

1.

Petitioner is an individual, whose address is, Route 4, Winder, Georgia, and the return for the period

herein involved was filed with the Collector of Internal Revenue for the District of Georgia.

2.

The tax in controversy herein, is income tax for the year 1952, in the amount of $341.00, all of which is in dispute.

3.

The determination of the tax set forth in the notice of deficiency is based upon the following errors:

(a) Petitioner is a member of the Georgia State Patrol and was such in the year 1952, and as such was an employee of the State of Georgia, subject to the rules and regulations and laws of the State as promulgated by the Legislature of the State of Georgia creating said Georgia State Patrol as amended from time to time up and until 1952. That said Act creating said Patrol, was enacted by the Legislature of Georgia in regular session in 1937 and was approved and became law March 19th, 1937, and known as "An Act to create A Department of Public Safety for Georgia".

(b) That Article 11, Section 1 of that Act provides: "There is hereby created and established a Division of the Department of Public Safety to be known as the Uniform Division, the members of which shall be known and designated as the "Georgia State Patrol".

(c) That Article 11, Section 11 of that Act provides: "That the Commissioner of Public Safety with

the approval of the Department of Public Safety, is authorized to divide the State of Georgia into Districts as may be necessary for the purpose of effectually patrolling the public roads and highways of the State and counties thereof". * * * And to provide for "serving meals at such barracks or quarters and for the upkeep and maintenance of same, to employ the necessary male cooks and servants who need not be members of the Uniform Division;" * * And provided, "when any officer or trooper is on duty away from his District he shall be allowed his proper expense for his meals and lodging".

So that, each Officer or Trooper as such employee of the State, solely for the convenience of his employer (The State) and as a necessary incident of the proper performance of his duty, received his food and lodging from his employer, the State of Georgia, in addition to his salary.

(d) That in 1951 the State of Georgia through its Legislature amended the Act of 1937, "Acts 1951 page 635", and abandoned the maintenance and support of the barracks by furnishing meals etc. and provided in Section 1 of that Act (page 636) for a minimum subsistence in addition to the salaries of all Officers and Troopers as follows: "Subsistence allowance shall not be less than four dollars per day for troopers and officers; Said subsistence allowance is hereby made mandatory in the sum of not less than four ($4.00) dollars per day and not more than five ($5.00) dollars per day and shall be in addition to all salaries and or compensation".

(e) That the Commissioner with the approval of the Department of Public Safety, was empowered to issue rules, regulations and standards of conduct and deportment, inspections as to neatness of appearance, cleanliness of uniforms, small arms, belts etc. including room, linen, blankets and such other paraphernalia as used by officers and troopers in their sleeping quarters and neatness of the automobiles furnished them by the State. That said rules and regulations of standards were issued and in force in 1952, and all officers and troopers were required by said rules to pay for and bear all the expense of laundry, dry cleaning, hair cuts, shining of boots and shoes, care of the leather belts, etc. washing of the automobiles etc., premiums on retirement fund, and meals, out of the subsistence set up and allowed by the 1951 Acts of said Legislature, all of which as a necessary incident to the proper performance of the duty required by the State of Georgia, employer of petitioner and as a complete substitute for the older and original plan where the State furnished all of these in addition to the salary, and was so regarded by the State of Georgia and no withholding taxes were ever deducted from this subsistence fund, though it was from the regular salary.

(f) That by reason of the foregoing averments, Respondent erred, in computing petitioners net income. by including therein as gross income the amount of subsistence ($1647.00) and adding it to the regular salary of petitioner, thereby computing his gross income as Three Thousand, Seven Hundred Ninety ($3,799.50) nine & 50/100 Dollars, when said gross income should have been computed at $2,152.50. It was error to fail to exclude from his gross income

the amount of said subsistence and disallowing same as such and treating same as gross income, and petitioner avers, that said amount of subsistence was properly treated by him in his income tax return for 1952 and that his net income therein was properly stated.

4.

The facts upon which petitioner relies as the basis for this proceeding are as follows:

(1) That petitioner was a trooper of the Georgia State Patrol for the year 1952.

(2) That as such trooper, he was required to reside at the barracks in Athens, Georgia day and night during the year 1952 while on duty and while he makes his home with his mother 26 miles away at Route 4, Winder, Georgia, he is subject to call at anytime while away from the barracks and during his off time and at his home.

(3) That his duties consisted of patroiling the area of his District or Division; that during the year 1952 he was on duty for 24 hours each day, but his watch or patrol time was mostly from 12 o'clock noon 'til 12 o'clock midnight, and while on such duties he ate four meals each day, and was required to pay for them out of the subsistence as a necessary incident to the proper performance of his duty and solely for the convenience of his employer, the State of Georgia, who had previously and originally furnished such expenses in addition to his salary.

(4) That the subsistence herein, was not in any way a reimbursement for expenses. Petitioner was not required while on regular duty to make out, keep a record of, or file any expense account for meals or otherwise, but was furnished by checks semi-monthly this subsistence, definite in amount, to defray certain and definite expenses, as set forth in paragraph 3 hereof in sub-sections (c), (d) and (e), and was merely a change in method of furnishing petitioner his board, lodging, laundry, dry cleaning, etc. by advancing to him cash in advance with which he was charged to expend for these necessaries, definitely fixed by the State of Georgia, and solely for the convenience of said State of Georgia and as a necessary incident to the proper performance of his duties for his said employer, the State of Georgia.

Wherefore, petitioner prays:

That this Hon. Court hear the proceedings filed herein, and determine:

(a) That Respondent erred in computing and adding petitioner's subsistence allowance of $1,647.00 to his gross income.

(b) That it be determined by this Hon. Court, that the gross income of petitioner for the year 1952 was $2,152.50 only.

(c) That the amount $1,647.00 be held to be not taxable income, and that there is no deficiency in income tax of petitioner for the year 1952.

(Sgd.) JAS. W. ARNOLD,
(Jas. W. Arnold),
Attorney for Petitioner,
P. O. Box 508,
Athens, Georgia.

(Sgd.) ROBT. L. RUSSELL, JR.,
(Robt. L. Russell, Jr.),
Attorney for Petitioner.
RUSSELL & RUSSELL,
Winder, Georgia.

Georgia,
Clarke County.

You, Harold Brannon Magness, do swear, that you are the petitioner in the foregoing petition, that you have read same and are familiar with the statements contained therein and that said statements are true.

(Sgd.) HAROLD BRANNON MAGNESS,
(Harold Brannon Magness).

Sworn to and subscribed before me this December 7, 1954.

(Sgd.) EDWIN FORTSON.
(Seal) Notary Public.

District of Georgia
U. S. Treasury Department
Internal Revenue Service
Chief, Audit Division
Room 618, 50 Whitehall St., S. W.
Atlanta 3, Georgia

Office Of
Director of Internal Revenue
In Replying Refer To:
A:R-SN: JPH

Sep 20 1954

Mr. Harold Brannon Magness
Route 4
Winder, Georgia

Dear Mr. Magness:

You are advised that the determination of your income tax liability for the taxable year(s) ended December 31, 1952 discloses a deficiency or deficiencies of $341.00 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays, and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the District Director of Internal Revenue, Audit Division, Room 618, 50 Whitehall Street, S.W., Atlanta 3, Georgia. The signing and filing of this form will expedite the closing of your return (x) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is the earlier.

Very truly yours,
T. COLEMAN ANDREWS,
Commissioner,
By (Signed) PAUL COBB,
District Director of Internal Revenue.

ors
Enclosures:
Statement
Form 1276
Agreement Form
A:R-SN:JPH

Statement.
Mr. Harold Brannon Magness
Route 4
Winder, Georgia

Tax Liability for the Taxable Year Ended December 31, 1952.

Income Tax:	Deficiency
1952	$341.00

In making this determination of your income tax liability, careful consideration has been given to the

report of examination mailed to you on September 15, 1954, and to letter from your attorney, Mr. James W. Arnold, dated September 15, 1954, requesting issuance of statutory notice.

A copy of this letter and statement has been mailed to your representative, Mr. James W. Arnold, Post Office Box 508, Athens, Georgia, in accordance with the Internal Revenue Service.

Taxable Year Ended December 31, 1952

Adjustments to Income

Adjusted gross income as disclosed by return..	$ 2,152.50
Unallowable deductions and additional income:	
(a) Unreported income	1,647.00
Adjusted gross income as corrected	$ 3,799.50

Explanation of Adjustments.

(a) It is held that the amount of $1,647.00 paid to you by the State of Georgia Department of Public Safety in addition to the amount reported on your return as compensation for services for the taxable year ended December 31, 1952 constitutes taxable income within the meaning of Section 22(a) of the Internal Revenue Code. Your income has been increased accordingly.

Taxable Year Ended December 31, 1952

Computation of Tax

Adjusted gross income as corrected	$ 3,799.50
Tax liability as computed from the tax table at Supplement "T", based upon 1 exemption	$ 640.00
Correct income tax liability	$ 640.00
Income tax liability as disclosed by return	299.00
Deficiency of income tax	$ 341.00

ANSWER.

(Title Omitted.)

Comes now the Commissioner of Internal Revenue, by his attorney, R. P. Hertzog, Acting Chief Counsel, Internal Revenue Service, and for answer to the petition filed herein admits, alleges, avers and denies as follows:

1. Admits the allegations set forth in paragraph 1 of the petition.

2. Admits that the tax in controversy herein is income tax for the vear 1952. Denies the remaining allegations set forth in paragraph 2 of the petition.

3. (a) to (f) Denies the errors alleged in subparagraphs (a) to (f), inclusive, of paragraph 3 of the petition.

4. (1) Admits the allegations set forth in subparagraph (1) of paragraph 4 of the petition.

4. (2) to (4) Denies the allegations set forth in subparagraphs (2) to (4), inclusive, of paragraph 4 of the petition.

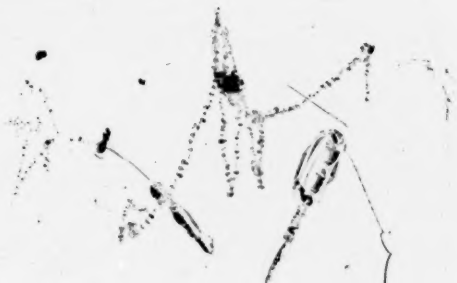
5. Denies generally and specifically each and every allegation set forth in the petition not hereinbefore specifically admitted, qualified or denied.

6. Further answering the petition, the respondent alleges that the document which is attached to the petition marked Exhibit "A" is not a true copy of the statutory notice of deficiency which was mailed to the petitioner on September 20, 1954.

Wherefore, it is prayed that the deficiency determined by the respondent be in all respects approved.

(S.) R. P. HERTZOG, F.V.H.,
(R. P. Hertzog),
Acting Chief Counsel,
Internal Revenue Service.

Of Counsel:
WILLIAM H. LOEB,
Regional Counsel,
H. FENTON DAY,
Special Attorney,
Internal Revenue Service.
Peachtree-Seventh Building,
Atlanta, Georgia.
HFD:md 1-31-55.



Filed Apr. 20, 1956.

(Title Omitted.)

Hearing At Atlanta, Georgia.

Date: April 9, 1956.

In the Tax Court of the United States.

Harold Brannon Magness, Petitioner,
vs. Docket Number 55503.
Commissioner of Internal Revenue, Respondent.

Courtroom,
United States Court of Appeals,
Atlanta, Georgia.
Monday, April 9, 1956.

The above-entitled matter came on for hearing, pursuant to notice to the parties, at 3:30 o'clock p.m.

Before: Honorable Stephen E. Rice, J., Presiding.

Appearances.

J. W. Arnold, Esq., R. L. Russell, Esq., Suite 503, Southern Mutual Bldg., Athens. Georgia, appearing for the Petitioner.

Herman Wolff, Jr., Esq., Special Attorney, Bureau of Internal Revenue, appearing for the Respondent.

The Clerk:
Docket Number 55503, Harold Brannon Magness.
Will you state your appearances, please?

Mr. Russell:
R. L. Russell and J. W. Arnold.

May it please the Court, I have filed an entry of appearance. My application to practice before this Court has not yet been granted. It will be filed today, sir.

The Court:
Very well.

Mr. Wolff:
Herman Wolff, Jr., for the Respondent.

Mr. Arnold:
Now, if Your Honor please, we are ready to respond to the subpoena duces tecum, but there is one little amendment I want in it, in the subpoena, and that is it says here, "United States of America to Colonel W. C. Dominy, Director of Public Safety, 959 East Confederate Avenue, Atlanta, Georgia. Now, Colonel Dominy is only an official of the State of Georgia and, of course, these records all belong to the State of Georgia, and I just want that amendment to state, "Colonel W. C. Dominy, Director, Department of Public Safety for the State of Georgia."
I just want that added in there to clarify the record.

Mr. Wolff:
I have no objection Your Honor.

The Court:
All right, the record will so show.

Mr. Arnold:
Mr. Magness, take the stand.

The Court:
I would like Opening Statements first, gentlemen.

Mr. Arnold:
Oh, yes, I beg your pardon. Well, let me see, have I got the burden here?

The Court:
You have it.

Opening Statement on Behalf of the Petitioner By Mr. Arnold.

Mr. Arnold:
This is a case where Mr. Harold Brannon Magness was a State Trooper, a member of the Georgia State Patrol during the year 1952, and the State of Georgia had divided, had given him a salary and, in addition, had given him a subsistence, so much a month, payable bimonthly, and the government came in and determined that that subsistence paid bimonthly was a part of his gross income and was subject to being taxed, and we are opposing that. That is in substance the whole case.

The Court:

You are relying on the reversal in the Saunders case?

Mr. Arnold:

And we are relying on the Saunders case and the facts in this case to substantiate it.

The Court:

All right. Mr. Wolff?

Opening Statement on Behalf of the Respondent By Mr. Wolff.

Mr. Wolff:

Substantially, what Mr. Arnold has stated is correct, Your Honor. The case involved a deficiency in the amount of $341 for the taxable year 1952. During the year 1952, Harold Brannon Magness, the Petitioner herein, was an employee and a member of the Uniformed Division of the Georgia State Patrol, a part of the Department of Public Safety in the State of Georgia.

During 1952, the Petitioner received basic payments in the amount of $2,152.50 from the State of Georgia. These basic payments were returned as income by Patrolman Magness.

In addition to the $2,152.50 received by Patrolman Magness, he also received payments of $4.50, or a total of $1,647 during the year 1952. This $4.50 per day was paid to the patrolmen of the State of Georgia when they were on duty or off duty, on vacation or otherwise. The sole issue presented is whether or not these payments of $1,647 were includable in the income of the Petitioner.

In reading the petition, it is apparent that the Petitioner is relying on the convenience of the Employer Rule in stating that the payments were not included in income. It is the position of the Respondent that the payments, because of the form and manner in which made, were included in income and should be treated as an increment of income and not as payments made for the convenience of the employer.

Of course, it is elementary that one of the purposes an individual has in seeking employment and performing the duties under the employment contract is the earning of a livelihood; and the employee must have subsistence if he is to live and perform the duties contemplated. Generally, too, it is a reasonable assumption, the reasonable assumption would be that the employee is dependent upon the subsistence, on the consideration flowing from the employment contract, whether that subsistence be in the form of money or in whatever form it may be.

Under such circumstances, it would seem that monetary payments received by Patrolman Magness in the case at bar come within the meaning of the term "gross income", and the treatment or remuneration or compensation under the definition of "gross income" under Section 22 (a) of the Internal Revenue Code of 1939.

Respondent contends that for the purpose of reporting income and paying the tax thereon, this Petitioner should not be regarded in a light more favorable than other taxpayers who, under their contract of employment, receive fixed compensation plus additional amounts and monetary allowances. In both instances, the employee receives X dollars under the contract of employment, whether or not that money, or the amount received is denominated into salary or

salary plus allowances or salary plus subsistence. The catch phrase furnished for the convenience of the employer has often been adopted as a short-cut expression to describe subsistence in kind furnished to an employee where the tax result has been favorable to the employee. Such a statement such as furnished for the convenience of the employer is obviously an oversimplification of the problem. The better and more accurate statement of the reason for the exclusion from the employee's income of the value of subsistence furnished in kind is perhaps that such value is excluded where the subsistence is furnished by the employer, not for the personal convenience, comfort or pleasure of the employee, but simply because he could not otherwise perform the services required of him.

In other words, though there is an element of gain to the employee in that he received subsistence in kind which, otherwise, he would have to furnish or supply for himself, he had nothing which he could take, appropriate, use and expend according to his own dictates; rather, the ends of the employer's business dominated and controlled, just as in the furnishing of a place to work or in the supplying of tools and machinery with which to work.

However, where the employee is furnished cash, this money may be expended in any fashion that the employee sees fit. He can expend the entire $4.50 for subsistence. He can expend a part of the $4.50 per day for subsistence; or the $4.50 he receives per day while he is on vacation, he can spend it for the other personal needs on that vacation.

To extend the convenience of the Employer Rule to the monetary payments received by the Petitioner in the present case would be clearly improper. In this

case, the employee's duties are of such a nature that he would have furnished his own meals, and the furnishing of money to him for that purpose was for his own convenience and not the convenience of the employer.

At this time, Your Honor, I would like to offer in evidence, as Respondent's Exhibit A, the 1952 Income Tax Return of Harold Brannon Magness and, also, the Information Return for the Calendar Year 1952, filed by the Department of Safety with respect to the $1,647 payment.

The Court:

Very well, it will be received in evidence.

(The documents above referred to were received in evidence and marked Respondent's Exhibit A.)

Mr. Wolff:

At this time, I would like to request permission to withdraw the original returns at a later date and substitute photostats.

The Court:

Very well, permission granted.

Whereupon, HAROLD BRANNON MAGNESS, called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk:

Will you state your name and address, please?

The Witness:

Harold Brannon Magness, Winder, Route 4.

Mr. Wolff:

At this time, Your Honor, I would like to move for the exclusion of other witnesses, to invoke the rule.

The Court:

Why do you make that motion in a case like this?

Mr. Wolff:

Your Honor, in the preparation of this case, there has been a certain amount of lack of cooperation, I think, in the furnishing of information to the Government, and in view of that I feel that the testimony Mr. Magness might give might suggest an answer to some of the other witnesses.

I will abide by the Court's wishes in the matter.

Mr. Arnold:

Now, if the Court please, I want to challenge that statement that there has been any negligence on the part of the officials of the Georgia State Patrol in cooperating with the Government, and we have some officials here and I think my brother is in error there. There has been no effor on the part—I know I have tried to cooperate and furnish the Government all the information in the world that I had, and I think he did call up and they told him to see their attorney, and he failed to see their attorney.

The Court:

All right, I am going to deny the motion. I don't think this is the type of case where we should exclude the witnesses.

Motion denied.

Direct Examination.

By Mr. Arnold:

Q. Now, your name is Harold B. Magness?

A. Yes, sir.

Q. Where do you live, Mr. Magness?

A. I live about approximately five miles north of Winder out on a farm.

Q. Where were you stationed, at what post, in the year 1952?

A. At Athens, Georgia.

Q. How far is that from your old home?

A. Approximately 25 miles.

Q. Now, you were a member of the State Patrol in 1952?

A. Yes, sir.

Q. When did you first enter the State Patrol, Mr. Magness?

A. 1941, December, December 4th, I believe.

Q. Are you active in the Patrol right now?

A. I am on leave of absence.

Q. You are on leave of absence?

A. Yes, sir.

Q. Is it your intention to return to the Patrol duty?

A. Yes, sir.

Q. What are you doing now?

A. Well, we have a small farm at home, and nobody's there but my mother and another brother. My father is dead and the farm laid out last year, practically, and I got a leave of absence to sow down part of the farm and get it in shape and get him started farming again.

Q. And you have been there attending to that?

A. Yes, sir.

Q. Do you make your home with your mother?

A. Yes, sir.

Q You are a bachelor, I believe?

A. Yes, sir.

Q. You have never been married?

A. No, sir.

Q. All right, now, you haven't been in the Patrol regularly since 1941, have you, Mr. Magness?

A. No, sir; I got a leave of absence in 1942, military leave, and I came back with the Patrol in, I believe, September or '48.

Q. And you have been with the Patrol since?

A. Yes, sir.

Q. And you were located at Athens, at the Athens Post, the entire year of '52?

A. Yes, sir.

Q. All right, Mr. Magness, how long did you have to enlist when you enlisted in the State Patrol, if you enlisted?

A. I believe four years.

Q. It was for four years when you first went in?

A. When I first went in—I don't know as I know just how long I was supposed to be with them.

Q. Well, can you just walk off?

A. No, sir.

Q What would happen to you if you just walked off without permission or anything?

A. I presume they would prosecute me.

Q. Well, do you know whether they would prosecute you or not?

A. Yes, sir; they would.

Q. Do you know whether they could do it or not?

A. Yes, sir; they could.

Q. They could do it?

A. Yes, sir.

Q. How do you get off?

A. Well, on a leave of absence.

Q. I know, but how would you quit the State Patrol if you wanted to quit?

A. Well, you ask for a leave of absence and you have got to get it in writing through channels, what they call channels.

Q. And who passes on that?

A. Well, the Colonel and Major and the Captain, Lieutenant of the District. It goes from your Captain on to the Colonel.

Q. That is the way it is done?

A. Yes, sir.

Q. Is the Colonel the highest ranking officer in the Patrol?

A. Yes, sir.

Q. He is called the Director?

A. Yes, sir.

Q. All right, now, Mr. Magness, where did you room when you were on patrol in Athens in '52?

A. At the Patrol Barracks.

Q. How many men are usually stationed, as a rule, at one Post?

A. I believe there were six men stationed at Athens.

Q. How many different Posts have you served?

A. Well, I have been in Athens and Washington, Toccoa and Gainesville.

Q. Didn't you serve at Cordele once?

A. There was—I was at Perry when I first went on. That is five.

Q. Five Posts you have served at?

A. Yes, sir.

Q. Now, Mr. Magness, I will hand you some checks and ask you to identify them.

What are those for? What were they given for?

A. These checks were paid by the Department of Safety to me for salary and subsistence.

Q. Salary and subsistence?

A. Yes, sir.

Q. See if that is your indorsement on that check.

The Court:

Well, now, isn't this a point where we can make an oral stipulation for the record?

Mr. Arnold:

I think so.

Mr. Wolff:

I think so, Your Honor. I have never seen them before.

The Witness:

Yes, sir; that is my signature.

By Mr. Arnold:

Q. Well, I will ask you if the subsistence and the salary is included in one check?

A. Yes, sir.

Q. But they are marked?

A. Marked different.

Q. Is it marked "subsistence", one of them, and the other marked "salary"?

A. Yes, sir.

Mr. Wolff:

I have no objection to the checks, Your Honor.

Mr. Arnold:
Well, we can stipulate them, then.

The Court:
Just offer them in evidence and they will be received in evidence.

Mr. Arnold:
Yes, sir.

The Clerk:
They will be marked Exhibit 1.

(The checks above referred to were received in evidence and marked Petitioner's Exhibit No. 1.)

By Mr. Arnold:
Q. Now, was that subsistence, Mr. Magness, was there ever any taxes withheld by the State of Georgia on those subsistence checks?

Mr. Wolff:
Objection, Your Honor.
I think he will have to show first whether he knows whether or not they were withheld.

Mr. Arnold:
Well, I reckon if he answers that, I will ask him whether they had been.

The Court:
Do you know whether they had been?

The Witness:
To my knowledge, I don't think they were.

Mr. Arnold:

Well, I can prove it up by somebody else.

By Mr. Arnold:

Q. So far as you know, there never was?

A. No, sir.

Q. Now, Mr. Magness, I am going to give you here and ask you what is this, tell us what that is, that document?

A. Well, that is a Station Blotter, or Daily Report. There is a copy and an original made up each day of each Trooper's activity, what he done and where he was. It shows where he was on whatever day it is.

Q. Now, you started up January 1st, there; is that it, there, or is it on the back?

A. That is the 31st. Let us turn it over here. That is January 1st, there.

Q. All right, now, I see there are some figures up there at the top.

What do those represent?

A. They don't list the Trooper's name. There is not room on these reports to write his name in. Each Trooper has a number, and he appears on this Daily Report or Blotter by number.

Q. Well, will you give the Court your number there?

A. Yes, sir; my number was 65.

Q. Harold B. Magness, Number 65?

A. Yes, sir.

Q. Will you give the Court the names of the Troopers that bore the other numbers?

A. On January 1st, it was Trooper 137 and 65; that 137 was a Sergeant, Sergeant Floyd.

Q. Sergeant Floyd was Number 137?

A. Yes, sir.

Q. All right, give us the numbers, first.

A. Troopers 76 and 23 was Trooper Sanderd and Trooper Strom. Trooper 199 was Corporal McCord, and Trooper 90 was Trooper Stewart, and then Examiner Craig, he was Driver's License Examiner, issued drivers' licenses.

Q. That appeared there on January 1st?

A. Yes, sir.

Q. Relate to us the activities of each Trooper and yourself on that date.

A. Well, on that date, Sergeant Floyd and I were on regular patrol. Do you want me to tell what we done?

Q. Yes.

A. We made seven arrests that day and we wrote eleven warning tickets and we aided two travelers. We run one patrol that day, traveled 187 miles, and we put in a total number of hours, that was 10.

Q. The number of hours was 10?

A. Yes, sir.

Q. Now, that shows the total mileage of the automobile that you-all were driving that day?

A. Yes, sir.

Q. 189, you say?

A. 187.

Q. 187?

A. Yes, sir.

Q. Now, Mr. Magness, was there any certain time, that is, hours, that you made that day? I mean, that you made each day?

A. No, sir; we were on duty 24 hours a day.

Q. You were on duty 24 hours a day?

A. Yes, sir.

Q. There wasn't any such thing as eight hours' or 10 hours' work? Then you were through?

A. No, sir; we were on duty 24 hours a day.

Q. You were on duty 24 hours a day?

A. Yes, sir.

Q. There wasn't any such thing as eight hours' or 10 hours' work and then you were through?

A. No, sir.

Q. Now, where would you eat, Mr. Magness? We will illustrate by saying, if you left the Post at eight o'clock in the morning, where would you eat for breakfast?

A. Well, we would eat out at some cafe or restaurant that was on our assigned route, where there was a telephone. If there was a telephone, we would call in the Station by radio on the car and give the Station the number of the telephone and the place where we were eating.

Q. Why would you do that?

A. Well, because if something came up that you had to take care of, they would know how to get in touch with you and where to contact you providing you were signed off the air by the radio.

Now, if it happened that you had to take a meal where there wasn't a phone, then one Trooper would sit in the car and listen to the radio while the other Trooper ate; and then when he got through, the other one that had just got through eating, he would relieve him in the car and let him go get his meal.

Q. Well, would that Trooper that sat in the car, would he often or ever patrol away from there for the time being?

A. Yes, sir.

Q. What time did you figure upon an average that it would take you to eat a meal?

A. Well, usually it would take about from three-quarters of an hour to—thirty minutes to three-quarters of an hour.

Q. I see.

A. Some people eat faster than others.

Q. Now, you say when you went to eat, you radioed the Station that you were driving up to Jones' Restaurant, we will say; is that correct?

A. Yes, sir.

Q. And if Jones had a telephone, you gave that number to the Station?

A. Yes, sir.

Q. And they would know where you were all during that time?

A. Yes, sir.

Q. In the event that a wreck occurred in that vicinity?

A. Yes, sir.

Q. Now, let me ask you something: Suppose that a wreck had occurred, would you have had to leave your meal there and gone to it?

A. Yes, sir.

Q. Did that ever actually ever happen to you?

A. Plenty of times.

Q. And you left your meal?

A. Yes, sir.

Q. All right, what became of that meal, or the expense of it?

A. Well, I had to pay for it. I have lost plenty of meals just on that account.

Q. Just on that account?

A. Yes, sir.

Q. Now, I will ask you if that record will show that you were on duty anywhere around 14 and 16 hours a day?

A. Yes, sir; it shows the number of hours that each Trooper—

Q. I mean, on patrol.

A. Yes, sir; it shows every hour that any Trooper was on patrol that was stationed at that Post.

Q. Let me ask you this: When you happened to be on patrol for those long hours, how many times would you eat a day?

A. Well, sometimes I have eaten two times, and othere have been times that I have eaten four times. It all depended on how long you stayed out and how late you were at night. We usually tried to, if we weren't tied up, to get three meals a day, but we was hindered from that sometimes.

Q. Mr. Magness, you had to pay for those meals yourself?

A. Yes, sir; paid for them out of subsistence.

Q. Out of subsistence?

A. Yes, sir.

Q. I am going to ask you this: In 1952, was $4.50 a day enough to pay that subsistence?

A. No, sir; it wasn't.

Q. How do you know that?

A. Well, you had to eat at so many different places and things were higher at places than they were at others, and each time a bunch of Troopers get together, you always hear the men talking about that they wasn't getting enough subsistence to eat on. I hadn't actually tested it out, so, in 1952, I decided I would test mine out and see how I come along with it. So, beginning in January of '52, I kept my subsistence entirely to itself to try it out to see.

Q. You didn't mingle it with your other money?

A. No, sir. I kept my subsistence separate from any other money that I might have had, but I hardly ever had any money in my pocket except my subsistence, because, if I needed any additional money, I had a bank account at my bank at Winder and I would write checks for that.

Q. Let me ask you something: Do you drink?

A. No, sir.

Q. Do you smoke?

A. No, sir.

Q. Do you gamble?

A. No, sir.

Q. Then, you didn't have much to spend money for except to eat, did you?

A. That is all.

Q. What are the rules and regulations about your uniforms and your shoes or boots and your leather belts and pistol scabbards?

A. Well, you have got to keep your leather all shined. You have got to keep your brass shined, keep your clothes clean and neat and pressed at all times, because you stand inspection every morning.

Q. How often do you stand an inspection?

A. Every morning by the Sergeant of the Station, and at least twice a week by the Lieutenant of your Division.

Q. Now, you have to bear the expense of all that shining?

A. Yes, sir.

Q. And laundering and the pressing of your uniforms and the cleaning of your uniforms?

A. Yes, sir.

Q. What about your bed linen?

A. The bed linen is furnished by the Department of Public Safety and you have got to keep it clean yourself.

Q. Have it laundered?

A. Yes, sir; and your blankets, you keep them dry-cleaned.

Q. What about your underwear?

A. You furnish your own underwear. The State doesn't furnish that.

Q. What about keeping it washed and laundered?
A. You have to keep that done yourself.
Q. You have to do that yourself?
A. Yes, sir.
Q. How often do you have a leave per month to go home or anywhere you want to go?
A. Well, you get a day a week, regular pass days. That is 24 hours.
Q. That is 24 hours?
A. Yes.
Q. That is four days a month?
A. Yes, sir.
Q. Now, when you get that day, or when you got that day, did you usually go home?
A. Yes.
Q. Mr. Magness, were you subject to call every minute of that 24 hours?
A. Yes, sir; I had to leave with the Station where they could contact me in case they needed me.
Q. At any minute?
A. Yes, sir.
Q. Now, then, do you have any leave of absence for vacation during the year?
A. You have 15 days.
Q. Fifteen days?
A. Yes, sir.
Q. Now, during that time are you subject to call?
A. Yes, sir.
Q. Do you have to register your whereabouts with the Station?
A. Yes, sir.
Q. And they have got to know where you are at all times during that time?
A. Yes, sir.
Q. Now, have you got, you Troopers, have you got any say-so or any discretion about where you will

eat, I mean when you will eat, or any discretion about these things at all?

A. No, sir; not if you are at work. If you are tied up, you have got to eat on the route you are assigned on if you are out on regular patrol.

Q. You have got to eat on that route?

A. That is right.

Q. You cannot go off to another route?

A. No, sir.

Q. And you have got to register where you are with the Station when you go to eat?

A. Yes, sir.

Q. What is the average distance from your Station, what is the average distance from the Station to the farthest point of patrol?

A. Well, you mean the farthest point from the Station?

Q. Yes, the farthest point from the Station; I am trying to get the area.

A. I would say 25 or 30 miles.

Q. Twenty-five or 30 miles?

A. Yes, sir.

Q. Now, that would be 50 there and back; 60 if it is 30, and 50 if it is 25?

A. Yes, sir.

Q. The round trip?

A. Yes.

Q. Now, would your patrol also include country roads off from where—off from the highways and the County roads? The County roads in your area?

A. Yes, sir.

Q. Now, would you patrol in pairs or single?

A. Well, a lot of times we would patrol single in the daytime, but mostly at night you would patrol double, two men.

Q. Patrol double?

A. Yes, sir.

Q. Was there any part of that year that you were assigned to night patrol?

A. Yes, sir.

Q. Do you remember about how much of that year that you were assigned to night patrol?

A. I sure don't. We usually were on patrol every night except when you were off.

Q. Now, let me ask you this: You are allowed four days a month, I believe?

A. Yes, sir.

Q. Are you allowed any time after the 15th day of December of any year?

A. No, sir.

Q. After the 15th day of December you are not allowed any time off?

A. No, sir, until after about the 5th of January, the 5th of January or beyond the 5th.

Q. I will ask you this: Are you allowed a day or two days or any amount of time extra after Christmas that you can make it up?

A. Well, you would lose two days in December. You couldn't take a day after the 15th. Where there are six men or more in the Station, they try to crowd the two days in by the 15th and then you can make those days up after, I would say, after January 5th, after the holidays were over you could make those days up.

Q. That would be two days extra?

A. That is right.

Q. For instance, in January you had four days and in this case you would take five?

A. Yes, sir.

Q. And you would make them up?

A. Yes, sir.

Q. And that would average four days a month per year?

A. Yes, sir.

Q. Did you take more than that in '52?

A. No, sir.

Q. Have you looked over those records t[illegible]?

A. Yes, sir.

Q. Did you take more than your 15 days in '52?

A. No, sir.

Q. Now, what was the rule regarding at night when you got back off of duty, off of your patrol? We'll say it was eight o'clock. What would you do that night?

A. Well, I'd come in and go to bed after I made up what we call our Form 10, maybe set around and breathe a little bit before we went to bed.

A lot of times it would be late at night when we would come in, and the weather would be cold or it might be raining or something, and we might get together and have an extra meal or something like that, be hungry, be out working a wreck and come in, but we would go to bed there at the Station.

Q. But you stayed in the Barracks?

A. That is right.

Q. That was the rules and regulations, was it?

A. Yes, sir; that is correct.

Q. And the passes that you were entitled to was the only time that you left there?

A. That is right.

Q. At other times outside of that you were right there in the Barracks?

A. Yes, sir.

Q. Does that record there show that?

A. Yes, sir; it shows the days that you were off and it shows the days that you were on duty.

Q. You have gone through that record?--

Mr. Wolff:

Your Honor, on some of these questions, Petitioner's Counsel is a little leading.

Mr. Arnold:

I beg your pardon. I will try not to lead him.

By Mr. Arnold:

Q. You have gone plumb through that record there, haven't you?

A. Yes, sir. I guess I helped make up part of them. I don't know.

Q. Did you ever do any radio work in the office?

A. Yes, sir.

Q. And desk work?

A. Yes, sir.

Q. Is that distributed out among the men?

A. Yes, sir. A man gets assigned to the office and radio just like he does on regular patrol.

Q. I see.

A. Usually, when you get an assignment in the office, you are on duty in the morning at eight o'clock and you stay on that radio and desk there until the last man comes in at night.

Q. Well, suppose a man is assigned some special duty, Mr. Magness, away from his Post; does that occur?

A. Yes, sir.

Q. Will that record show it?

A. Yes, sir; it sure will.

Q. Were you ever assigned any special duty away from the Post in '52?

A. I sure was.

Q. Where was it?

A. I had an assignment in Elberton, Georgia.

Q. Now, do you remember how many days?

A. No, sir; I don't. I could check this thing and tell you.

Q. That record would show that?

A. Yes, sir; and I believe in '52, I was assigned another detail, I believe it was at Columbus. They were having a storm down there and I went down there for, I don't know, two or three days. It will show it on this Blotter.

Q. That record there would show it?

A. Yes, sir.

Q. Were you ever assigned to the Southeastern Fair up here?

A. Yes, sir, I was, but I don't recall whether it was in '52 or not; it could have been.

Q. Well, I will ask you this: On these special assignments, how did you sleep and how did you eat? Did you have to pay for your sleeping quarters out of your subsistence?

A. No, sir, the place that we slept, we were assigned to those places. Now, how they were paid for, I don't know, but our subsistence, we had to eat on that. Our meals weren't furnished; we had to furnish our meals.

Q. You ate your own meals out of your subsistence?

A. That is right.

Q. And where you roomed, your sleeping quarters, they were assigned to you and that is all you know about it?

A. That is right.

Q. And you don't know who paid for that?

A. No, sir.

Q. Were you in the Service, Mr. Magness, before the subsistence was granted per month?

A. No, sir.

Q. You are not familiar with the plan they had in those days?

A. No, sir; I went with the Patrol in 1941, December.

Q. Now, Mr. Magness, when you were off on your regular pass days, four a month, where did you eat?

A. I ate at home.

Q. You ate at your home?

A. Yes, sir; that is where I went. I had done work each time when I got off, I worked there on the farm.

Q. You worked there on the farm and you ate there?

A. Yes. My daddy was dead and my mother was there and I helped.

Q. And you didn't spend any of your subsistence for those meals?

A. No, sir.

Q. Now, when you were on your 15-day pass—What does that record show about your pass? You said you had looked at it.

A. Well, you mean my day a week off?

Q. No, no.

A. My 15 days?

Q. Your annual pass.

A. It shows I was off on annual leave.

Q. What does it give? Do you recall?

A. The days.

Q. Yes.

A. I believe I taken seven at one time and eight at another. Made it 15; you could split it.

Q. Don't get them mixed up.

A. This is January.

Q. Now, while you were off those days, did you spend any of your subsistence money?

A. No, sir.

Q. Your subsistence money was spent entirely for subsistence, then, while you were actually patrolling?

A. That is correct.

Q. And you say, I believe, you slept in the Barracks every night?

A. Yes, sir.

Q. And the other men slept there, too?

A. Yes, sir. That was the rules and regulations, you had to stay there.

Q. Now, I will ask you if at every Post you served if that wasn't the rules and regulations.

A. Yes, sir.

Q. And you have served at five separate Posts in the State?

A. Yes, sir; that is right.

Q. Did you have to apply in writing for your annual leave?

A. Yes, sir.

Q. Did you have to do the same thing for your pass on your monthly leaves?

A. No, sir; you didn't have to write in for that. Each man was entitled to a day, and it was granted to him by the Department, and the Sergeant of the Station handled that.

Q. Well, what I mean to ask you is this:—If I make myself clear—Suppose you ask off tomorrow and it didn't suit the Sergeant in regulating his affairs. He would and could deny you?

A. Yes, sir; I have done it; been denied a lot of times.

Q. It had to be done in accordance with the Commander of the Post?

A. Yes, sir.

Q. And he was the Sergeant?

A. Yes, sir.

Q. Were you ever ordered, Mr. Magness, just instantaneously that way, before you had any notice of it, to report to some place away?

A. Yes, sir.

Q. And you had no preparation of your own?

A. No, sir.

Q. And you went?

A. That is right; yes, sir.

Q. You had no other recourse but go, did you?

A. No, sir.

Q. Mr. Magness, did you have any discretion or any control whatever over where you patrolled any day?

A. No, sir. The sergeant of the Station made up a Duty Roster.

Q. Made what?

A. Made what they called the Duty Roster. That showed who was to work and where they would work, what car they would work in, and so forth.

Q. In other words, you didn't use the same patrol area the same day?

A. No, sir.

Q. I mean for two days or three days?

A. Well, you might—You—

Q. You might do it and you might not?

A. That is right.

Q. It is entitely what the Sergeant directed?

A. Tnat is right.

Q. Did you know from day to day what patrols you would have?

A. After coming in from patrol, like today's patrol, you come in, whatever time you come in in the night and he would have the Duty Roster made up. He had a Board there to put it on, and the Daily Duty Roster was put up there and you could look on that Duty Roster and tell what route you was on the next day, or what your work was.

Q. And what time, it would tell what time for you to go out?

A. Yes, sir.

Q. Let me ask you this, Mr. Magness: Was such an order as assigning you or any other Patrolman to a wreck, detail—

A. Yes, sir; after the last car would come in, from the last patrol at night, there would be Troopers assigned to a Call Duty, and if you got a wreck or any kind of call during the night, whoever was on call, then they would get that assignment to go answer it.

Now, if they were off on a call and tied up and another call came in, then some other man or some other Troopers would have to go and catch that one.

Q. Now, if you were on a wreck call—

You are assigned, as I understand it, on a duty roster to wreck calls?

A. Yes, sir.

Q. And even if you were in the bed during the night and a wreck occurred and it was radioed in there, you would have to get up and go to it?

A. Yes, sir; if you were on call; yes, sir.

Q. Or whoever was on that wreck call?

A. Yes, sir, he would have to answer it.

Q. He would have to answer it?

A. Yes, sir.

Q. Have you ever had to work as much as a day and a night on one patrol?

A. Well, I worked as much as 16 and 18 hours.

Q. On one patrol?

A. Yes, sir.

Q. That would be when some wreck had occurred?

A. Yes, sir; as a rule.

Q. As a rule?

A. Probably; yes, sir.

Q. Were your beds assigned to you, too?

A. Yes, sir; they had beds in the Barracks and then you would have a bed assigned to you, and you would probably change sometime. Maybe change from one room to another with some other Trooper if you didn't like the room you was in, but you did have a bed assigned to you.

Q. Was there any one particular car assigned to you?

A. No more than just going out on patrol.

When you went out on patrol, this car was assigned to whatever Troopers was in the car. The Sergeant of the Station usually assigned the car to one Trooper, and some Stations that I worked at, they would assign them to two Troopers together, and they would be responsible for that car and have to keep it up and see that it was greased and the mechanical parts kept in shape and be ready to go at all times.

Q. Now, did you or not make your income tax returns on your salaries?

A. Yes, sir.

Q. Made those every year?

A. Yes, sir.

Q. But did not return any taxes for your subsistence?

A. No, sir.

Q. Do you know why you didn't do that?

A. Well, the income tax man, I believe, was Mr. Allen at that ime, and it was a rule that was handed down to him that subsistence wasn't taxable.

Mr. Wolff:

Objection, Your Honor, on the grounds that there is no showing how the Petitioner ever came of this knowledge or whether any such ruling was ever issued.

The Court:

That is not binding on the Commission anyhow, not on this Court. No agent can bind the Commission, so it is not going to hurt your case.

Mr. Wolff:

I withdraw my objection.

By Mr. Arnold:

Q. Now, can you identify all of those, Mr. Magness, as being the only official records that went out of that Post of your daily activities, of each Trooper for 1952?

A. Yes, sir; the original was sent to Atlanta, up here to Headquarters. The duplicate was kept at the Station.

Q. And that is the duplicate copy?

A. That is right; that is correct.

Q. And that is the only official record that goes out to the Post of the daily activities of the Troopers, goes out of the Post?

A. That is right. It is made up each day along with the activity that you get during the day. What I mean by the activity would be the warning tickets you issue, the arrest tickets that you make, the arrests

that you might work; you send this report in to Atlanta, the original, the original and one copy of the Wreck Reports that you might work that day.

Q. I want to ask you about that right there. If you worked a wreck that day, would you make a separate report on that?

A. You had a Wreck Report form that you filled out. Yes, sir, it is separate to this. This form is made up in a—You put the location on it. You put the number of the highway or the name of the road that the accident occurred on, and the description of the automobiles that might have been involved or that was involved, and the injury that might have occurred; and then you draw a diagram of that accident on that accident report, and then there is a place for the remarks, and you write there what happened or what in your opinion happened.

Q. I will ask you if that matter which you just described there, if that isn't, you do write something privately there; that is for your superiors to see, isn't it?

A. Yes, sir.

Q. That is not for the public?

A. No, sir.

Q. That itself mentions the wreck?

A. Yes, sir.

Q. But that is all that does?

A. Yes, sir.

Q. You estimate the damage, too, don't you?

A. Yes, sir.

Q. And you also put on there those private remarks, who you think is to blame, don't you?

A. Yes, sir; what vehicle.

Q. But that only goes to your superior officers?

A. That is right.

Mr. Arnold:

I believe he is with you.

Cross Examination.

By Mr. Wolff:

Q. How far was your patrol Station from Athens in 1952?

A. The same as it is now; I would say about 25 miles, 26, something like that. I never did measure it.

Q. Did you state you were on military leave from 1942 to 1948?

A. I asked for leave of absence; yes, sir; getting military leave to go to the Army in 1942.

Q. When were you discharged from the Army?

A. I never did have to go to the Army; I was rejected at Fort Mac—Fort McPherson.

Q. And you came back in as a Trooper in 1948?

A. Yes, sir.

Q. You were on military leave from 1942 to 1948?

A. Yes, sir.

Q. But you weren't in the Army?

A. No, sir.

Q. Or the Armed Services?

A. No, sir.

Q. Were you required to room in the Barracks, Mr. Magness?

A. Yes, sir; that was the rules and regulations of the Department.

Q. If you were married, would you be required to live in the Barracks?

A. Yes, sir; that is the rules and regulations.

Q. You read there from January 1st, the Daily Report Form 11, that you were on patrol for nine hours. What did you do, for example, when you came off patrol, Mr. Magness?

A. I believe it was 10 hours.

Q. Ten hours, then.

A. When I came in from patrol, I would make up what we call the Form 10, pencil it out. Then, after I got that penciled out and didn't want to go to bed, I would sit around and play checkers and read the paper.

Q. Could you leave the Station if you wanted to?

A. Yes, sir; you could leave, but you would have to let them know where they could contact you.

Q. Could you go to the movies if you wanted to?

A. Yes.

Q. You weren't required to stay in the Barracks at all times then?

A. You had to be where you could be contacted in case you were needed.

Q. Do you know how many times in 1952 you had to leave a meal and answer a call?

A. I sure don't.

Q. You stated that you kept a record of your subsistence received during 1952.

Did you keep any notations of the amount of subsistence spent?

A. No, sir; the only way I kept that, I kept my subsistence in a pocket to itself, and I ate out of that, and I only used it for subsistence for the purpose of eating, and if I needed any other money to pay my laundry, my dry cleaning, or what have you, I wrote a check, and I paid those bills by check.

Q. Are the uniforms furnished by the State Department of Safety?

A. Yes, sir.

Q. In 1952, while on your vacation, were you called off your vacation to report to duty?

A. No, sir.

A. On any of your days off, were you ever called in 1952 to report back to duty?

A. I don't believe I was.

Q. Ordinarily, would you be?

A. Well, it does happen.

Q. How many routes are covered by your Athens Station?

A. They had it divided into two routes, A and B.

Q. Did any of those go by Winder?

A. Yes, sir; went into Winder. Barrow County was a split County between the Athens Post and the Gainesville Post.

Q. If you happened to be at meal time around your mother's house, would you stop and eat there?

A. No, sir.

Q. Did your mother have a telephone?

A. In '52?

Q. Yes.

A. No.

Q. What was this day off? Was that one day a week or four days a month?

A. One day a week and four days a month. That is the way we got it. We taken it one day a week, but you couldn't get but four days a month, 48 days a year, pass days.

Q. You stated that the wrecks were summarized on Form 11. There was a separate report, is that what it is?

A. Yes, this is a Form 11 here.

Q. And then Form 11, it mentioned the wrecks on there?

A. Yes.

Q. The number of miles devoted to the wreck?

A. Yes, it has got a place that you list them. I can find one, if you would like for me to.

Right here, on January 22nd, Corporal McCord and I were on patrol. We worked two wrecks that day. We worked two accidents, and we was four hours on those two accidents.

Do you want me to give you the rest of the activity of that day?

Q. Yes.

A. We made two arrests. We traveled 109 miles and was out on the road eight hours.

Q. That is including the time that you were at the wreck?

A. Eight hours on patrol and four hours on the wrecks would be 12 total hours. Eight and four is 12. It would be 12 hours total hours that we were on duty that day.

Q. Were you paid an additional amount of subsistence on detail?

A. No, sir.

Q. What sort of shifts did you-all operate in the Barracks or at this Station?

A. What was that question?

Q. What sort of shifts did you operate on?

Did you have various shifts?

A. We went out a lot of times in the early morning, but most of the time we would go out at one o'clock in the afternoon and work until around midnight, until the traffic slowed down, and there wasn't too much traffic out on the road, and then we would come in.

Q. Getting back to the subsistence payments, you kept no records, I take it?

You said you took money out of your pocket; you kept no record of your subsistence payments at all?

A. No more than keeping my subsistence. I would get my check cashed and I would take my subsis-

tence out of the check, deduct it from the total amount and deposit my salary in the bank and take my subsistence and keep it in my pocket for eating purposes. That is the only record I kept.

Q. Was it customary for the restaurant operators not to charge you for the meals that you ate?

A. No, sir; we paid for all of our meals.

Q. Did any of the restaurant operators not charge you for a meal?

A. Never did give me none.

Q. Did the State ever furnish you any meals?

A. No, sir.

Q. You always received subsistence payments from them?

A. That is right.

Q. Does the State make any adjustment to your subsistence payments to include an allowance only for meals that you eat while on duty?

A. How was that question?

Q. Are you paid a subsistence on the days that you are off, that you do not work?

A. Yes, sir; we get our subsistence regularly in our check every month. You get two checks a month.

Q. Do you get that subsistence while you are on vacation, too?

A. Yes, sir.

Q. Are you required to eat at a certain time?

A. No, sir.

Q. You are required to eat in a certain restaurant or certain restaurants, are you?

A. No, sir.

Q. Who pays your medical expenses, including doctor bills and hospitalization?

A. I always paid mine. You have to pay your own.

Q. Does the State furnish your automobile for patrol purposes?

A. Yes, sir.

Q. How is it that you came to be assigned to this Station in Athens?

A. Well, I was stationed at Washington, Georgia, and I got transferred to Toccoa and stayed at Toccoa about three months, I believe it was, and I consulted and talked with the Colonel and asked him about getting assigned or transferred to Athens, and after a period of about three months, he had an opening, and he transferred me down to Athens.

Q. Why is that, so you could be close to home?

A. No.

Q. Was the subsistence allowance greater to a Corporal than to a Private?

A. No, sir; it is all the same, Sergeant, Corporal.

Q. Did the Colonel receive the same?

A. I don't know about the Colonel.

Q. All of them in the Station received the same, at any rate?

A. That is right; yes, sir.

Q. When you were appointed, did you undergo any special training?

A. Yes, sir.

Q. For how long?

A. Six weeks. I believe it was six, five or six.

Q. If your patrol route took you by your house around meal time, could you eat at home?

A. I never did.

Q. Could you have?

A. I could have, I imagine, but I didn't.

Q. I believe you stated you had prepared some of these Form 11's yourself.

A. I said I might have. I have no way of identifying that I did, because the Sergeant at the Station signed them. I could look through them to see if I

was assigned to the office that day and if I was, I probably made the report of that particular day.

Q. All right.

Will you take the back of that one sheet there and explain what is meant by "radio operator hours"?

A. Yes, sir. That "radio operator hours" shows how many hours you operated the radio in the Station. We had a radio there in the Station and you could keep in contact with the cars, or if you couldn't reach Atlanta by radio, then you could through one of the other closer stations that could contact Atlanta.

Q. What is meant by "office and reserves—hours"?

A. On this report I am holding here, Office and Reserves, Trooper 199, who was the Corporal at that time, McCord, he got office and reserves here; radio operator hours, six hours; office and reserve hours, eight. He had 14 hours in all, and he taken credit for radio operator hours of six. Six of those he gave credit for operating the radio. And for his office work, making up your reports and other things, eight hours for that. That gave him a total of 14.

Q. Was that answering the phone and filling out forms, and so forth, the eight hours?

A. Making out reports, yes; anything that was to be handled there in the office by him when he was assigned to the office.

Q. What is meant by the following line, "Detached Service Date"?

A. That is just like when I went to Elberton on that detail there. They counted that detached service.

Q. Did that mean for the 24-hour period?

A. Yes.

Q. That meant for 24 hours?

A That is right.

Mr. Wolff:
No further questions, Your Honor.

Mr. Arnold:
We tender in evidence that exhibit. I believe that is already admitted, those subpoenas.

The Court:
Very well, they are received.
Are there any further questions of this witness?

Mr. Arnold:
I believe not, Your Honor.
Wait a minute.

The Clerk:
That will be received as Exhibit 2.

(The document above-referred to was received in evidence and marked Petitioner s Exhibit No. 2)

The Court:
You had better mark these spearately.

The Clerk:
Then, Exhibits 2 through 13 are received.

(The documents above-referred to were received in evidence and marked Petitioner's Exhibits Nos. 2 through 13.)

The Court:
How many more witnesses do you have?

Mr. Arnold:

We have probably two or three more, Your Honor, but I don't think they will be too long inasmuch as Your Honor has ruled, I believe—

Now, we were prepared to make this showing; we can prove that the State Patrol submitted and asked for a ruling to the Collector of Internal Revenue whether or not this subsistence was taxable; and they received a ruling that it was not.

The Court:

Well, you must have misunderstood my ruling. I overruled the Respondent's objection to that.

Mr. Arnold:

I beg your pardon.

The Court:

And what I said was it is not binding on the Commissioner even if the Commissioner himself had issued the ruling. He can come along later on and reverse himself. There is nothing binding.

Mr. Arnold:

It is five o'clock, and I believe Your Honor said you would give us an hour in the morning?

The Court:

Yes, if we start at nine o'clock.

Mr. Arnold:

If that wouldn't inconvenience His Honor, I believe I could use that hour and get through.

The Court:

Well, now, if you don't get through, it is going to bollux up my calendar rather badly.

Mr. Russell:

I believe, Your Honor, that as far as we are concerned, we can finish in an hour.

The Court:

You have got to figure cross examination in there.

Mr. Arnold:

I think we can finish in less than an hour because these other questions, I am going to be very brief on, as Your Honor has already ruled that we can't introduce any law in evidence because that is already the law.

The Court:

I can take judicial notice of that, and you can point it out to me on the brief what the law is.

Mr. Arnold:

Yes, sir.

The Court:

All right, we will recess until nine o'clock tomorrow morning.

(Thereupon, at 4:45 o'clock p. m., Monday, April 9th, an adjournment was taken until the following day, Tuesday, April 10, 1956, at 9:00 o'clock a. m.)

Filed Apr. 20, 1956.

(Title Omitted.)

Hearing at Atlanta, Georgia.

Date April 10, 1956.

In the Tax Court of the United States.

Harold Brannon Magness, Petitioner,
vs. Docket No. 55503.
Commissioner of Internal Revenue, Respondent.

Courtroom,
United States Court of Appeals,
Atlanta, Georgia,
Tuesday, April 10, 1956.

The above-entitled matter came on for hearing, pursuant to adjournment, at 9:00 o'clock, a. m.

Before: Honorable Stephen E. Rice, J., Presiding.

Appearances:
(As heretofore noted.)

Proceedings.

The hearing was called to order at 9:00 o'clock a. m.

The Court:
Be seated, please.

Mr. Arnold:
Mr. Mayo, take the stand, will you please, sir?

Whereupon, ROBERT G. MAYO, was called as a witness by and on behalf of the Petitioner, and, having been first duly sworn, was examined and testified as follows:

The Clerk:

State your name and address for the record, please.

The Witness:

Robert G. Mayo, 1575 McLendon Avenue, Northeast, Atlanta, Georgia.

Direct Examination.

By Mr. Arnold:

Q. Mr. Mayo, are you now with the State Patrol?

A. No, sir, I am not.

Q. How long has it been since you were with the State Patrol?

A. February, 1941.

Q. I will ask you if you were with the State Patrol in its very beginning, in its formation?

A. Yes, sir; I was.

Q. What position did you occupy?

A. Treasurer.

Q. I will have you look at this document right here and tell the Court what that is?

A. That is the Minutes of the Board of the Department of Public Safety.

Q. That is the Minutes of the Board?

A. Yes, sir.

Q. Were you acting officially when those Minutes were drawn?

A. Yes, sir; I was.

Q. Is that the official Minutes of the Board?

A. It is.

Q. I will ask you if that is the first meeting of the Board, the Minutes of the first meeting?

A. Yes, sir.

Q. I will ask you to look right here and tell me, Mr. Mayo, what were the Troopers paid when they—at first?

A. $100 a month.

Q. And then how were they fed?

Mr. Wolff:

Objection, Your Honor.

I want to know first off, if Mr. Mayo is testifying from his own personal knowledge or if this is recollection, or what it is.

By Mr. Arnold:

Q. Are you testifying from your recollection, your own knowledge?

A. I am testifying from the law that was created for the Department of Public Safety.

Mr. Wolff:

If he is testifying in respect to the law, The Court can take judicial notice of any law.

By Mr. Arnold:

Q. Are you also testifying from what you know of your own knowledge that occurred then?

A. That is right.

The Court:

All right, go ahead.

By Mr. Arnold:

Q. Now, you say the men were paid $100 a month?

A. Yes, sir.

Q. And were they given anything else?

A. Their meals were furnished.

Q. Their meals were furnished by the State?

A. Yes, sir.

Q. Now, I will ask you to read into the record—

Mr. Arnold:

Now, if Your Honor please, we don't want to introduce this because this is the Minutes and they are using them yet, this book; if we may be permitted to read from a portion of the Minutes and put that in the record?

The Court:

All right. Go ahead.

Mr. Wolff:

May I see the Minutes, first, Your Honor?

The Court:

Very well.

Mr. Wolff:

May I say, Your Honor, the first page here, Page 3, is noted "Copy of a Letter Purporting to be from Mr. Rivers."

The next thing is headed "Report to the Board of the Department of Public Safety" on Page 2, is where Mr. Mayo was getting ready to read. This report was apparently transmitted by this copy of this letter of June 15, 1937, appearing on Page 3.

Mr. Arnold:
From the Governor.

Mr. Wolff:
From the Governor, and this report is apparently a copy of a report also; it doesn't seem to be the report at all, the original, and I object to it on that ground.

The Court:
The objection is overruled.
Go ahead.

By Mr. Arnold:
Q. Read from this just right here, Mr. Mayo; just that right there.
A. "The men were paid $100 a month during a period of intensive training, and their meals were furnished."
Q. Now, do you know of your own knowledge that that is true and correct?
A. Yes, sir; I do.
Q. Mr. Mayo, at the time of the beginning of the formation of the Georgia State Patrol, did you assist and help to organize the first troop?
A. Yes, sir.
Q. I will ask you who was the Director at that time.
A. Clement E. Sutton was General Counsellor.
Q. Was Captain Carter in it?
A. He was in it as Director of the Uniformed Division.
Q. Who was Captain Carter? I believe he is dead.
A. I believe he is; yes, sir.
Q. Who was he?

A. He was the former Captain of Cavalry, U. S. Army.

Q. I will ask you whether or not he did or not form the Uniformed Division on a pattern with the United States Cavalry?

A. Yes, sir.

Mr. Wolff:

Objection, Your Honor.

I don't think this is relevant to the issue at all.

Mr. Arnold:

I think we are able to show that this is a military organization, if Your Honor please.

The Court:

All right, go ahead.

By Mr. Arnold:

Q. Was that true?

A. Yes, sir.

Q. And as long as you were in the Patrol, was his system followed so far as the military organization was concerned?

A. Yes, sir; very much so.

Q. You are more or less familiar with the Patrol of today, and I will ask you if you are, is it being followed, that policy of military organization followed today?

Mr. Wolff:

Objection, Your Honor.

Mr. Mayo testified he has not been in the Patrol since 1941.

Mr. Arnold:
I asked him if he was familiar with it, if he had kept in touch with it and is familiar with it today.

Mr. Wolff:
I presume that Mr. Mayo is not familiar with the internal organization of the State Patrol.

Mr. Arnold:
He might be.

The Court:
Are you?

The Witness:
Yes.

Mr. Wolff:
I would like to know how he is familiar, then.

The Witness:
When the Department of Public Safety was formed, it was the responsibility of the men in the Patrol to see that it was operated successfully, and it was very much in the hearts of every one of the Troopers, and every man that has left has kept in constant touch with it.

The Court:
All right, go ahead. Answer the question.

By Mr. Arnold:
Q. You say that military policy that was formed by this old cavalry officer, Captain Carter, is in vogue today?

A. It is in vogue today.

Q. Now, Mr. Mayo, how did you manage to feed the men and barracks them when you first started?

A. When the Patrol was first started, the men were placed wherever we could find a place, boarding houses or old vacant schoolhouses, or just any place that we could find.

Q. That is, for them to sleep?

A. Yes, sir.

Q. And get their meals at some central place, or not?

A. Oh, yes, we had to have a boarding house. Most of them were housed in places wherever they were situated, and in a boarding house, and they ate their meals there, of course.

Q. Now, I am going to ask you: Did you make any changes later in that system?

A. Yes, sir; we did.

Q. What changes were made?

A. We found it absolutely impossible because we only had one man in the Headquarters and one secretary to handle all of the multiple financial details of the Patrol, and it was just too voluminous to do; so, the Board changed it to a subsistence type of pay and paid it out bimonthly.

Q. Bimonthly to the Troopers?

A. To the Troopers.

Q. The subsistence?

A. That is correct.

Q Why was it a failure? In what particular, Mr. Mayo?

A. Well, there were several reasons for its being a failure one of them being, as I said before, the office work was too voluminous to handle, and the other thing, it would take the Troopers off the road.

After all, they only made $100 a month and that wasn't enough for them to eat anywhere else.

Q. And it would take the Troopers off the road?

A. It would, sir.

Q. And leave the area unpatrolled?

A. If they ate, it would; yes, sir.

Q. They usually ate, didn't they?

A. Yes, sir; had to.

Q. Now then, it was expensive, more expensive to the State to maintain that sort of an organization?

A. Well, it was almost impossible to maintain that sort of organization.

Q. That is, I believe you testified that that entailed a great deal of work?

A. It did.

Q. And with this change of paying them a salary by the month and subsistence by the month, did that lessen the expenses to the State?

Mr. Wolff:

Objection, Your Honor.

He is leading the witness. He has been trying to get him to say one thing for the last three questions.

The Court:

Don't lead your witness.

Mr. Arnold:

I am not trying to lead him purposely.

By Mr. Arnold:

Q. Why did the State, Mr. Mayo; for what reason did the State desire to change from the feeding them in barracks or boarding houses to giving them a subsistence?

A. The only reason that we changed—the only two reasons that we changed, was because it was impossible from an office procedure standpoint to handle it; and because it would take the man off the road, off of their patrol duty.

Q. To come there to their meals?

A. To come there to their meals at any one centrally located place; it was an impossible situation.

Q. Was it more expensive to the State to operate it like you started and with men, men having their own mess, or in boarding houses, than it would be to give them subsistence?

A. We couldn't, with the limited amount of funds that we had in the Department of Public Safety at that time, which is supported entirely by the dollar from the driver's license. We could not have set up messing facilities and bought refrigerators and stoves and cooking utensils and all. It would have been virtually impossible. It would have been financially impossible.

Mr. Arnold:

He is with you.

The Court:

Let me see if I understood that last answer.

Was it that it was more expensive to the State to do it the way you started than the subsistence?

The Witness:

Yes, Your Honor, it was absolutely more expensive.

Cross Examination.

By Mr. Wolff:

Q. You testified, Mr. Mayo, that the Board decided to change from the meals to subsistence payments.

Will you show me in the Minutes where that was authorized?

A. I haven't seen these Minutes in 19 years. I don't know where it is.

Q. Was it authorized in the Minutes?

A. It was authorized by law, as a matter of fact, and the Board would merely have set the amount, if I remember correctly.

Q. What was authorized by law?

A. Subsistence and salary.

Mr Arnold:

That is correct, Your Honor There is legislation that fixed this subsistence itself, but it fixed a minimum, and that is a matter of law

By Mr. Wolff:

Q. While Mr. Russell is looking through the Minutes, Mr. Mayo, I would like to ask you a few more questions.

Were you yourself furnished meals while you were Treasurer, Mr Mayo?

A Yes, I was a member of the Uniformed Division and was furnished meals in the same manner as the others.

Q. When it was changed to subsistence, were you paid subsistence?

A. I was.

Q. What were your duties as Treasurer, Mr. Mayo?

A. As Treasurer, it was my duty to handle the financial business of the Department, to set the budget, to inspect the barracks for the manner in which they were kept, and, well, I think I had 17 titles.

Q. Where were you stationed, Mr. Mayo?

A. I was the Headquarters man.

Q. In Atlanta?

A. Yes, sir.

Q. At Confederate Avenue?

A. Yes, sir.

Q. Were you required to travel?

A. I was.

Q. How often?

A. That was more or less at my own discretion because, as the Department required it, or the duties of the Department required it, then I traveled.

Q. Could you estimate the number of days a month you traveled?

A. Well, if I might be so bold as to quote my wife, she expected me when she saw me.

Q. Could you estimate the number of days that you traveled?

A. Out of the four years that I was there, I would estimate that I was traveling at least half the time.

Q. You received subsistence every day for every day? Each and every day?

A. That is correct.

Q. Are you familiar with the rules and regulations back in 1937 to '41?

A. Yes, sir.

Q. Were you men required to live in the Barracks?

A. Yes, sir.

Q. Did you live in the Barracks?

A. No, sir.

Q. Were you a special exception?

A. No, sir; there were no Barracks established in the City of Atlanta.

Q. They were required to live in the Barracks only insofar as Barracks were furnished?

A. Barracks were furnished everywhere excpet in Atlanta at that time.

Q. Were married individuals required to live in Barracks?

A. On the Stations, they were; yes, sir. The wives didn't come to the men until about six months after the Patrol was started.

Q. What happened after the Patrol was started? Were they required to live in the Barracks?

A. Oh, yes, sir.

Q. And where did the wives live?

A. Wherever they were before the Patrol started.

Q. Were you permitted to eat at home while you were on duty?

A. Why, yes, I was permitted to eat wherever I wanted to eat.

Mr. Wolff:

You find those Minutes, Mr. Russell?

Mr. Russell:

Off the record, please

(Discussion off the record.)

The Court:

On the record, gentlemen.

By Mr. Wolff:

Q. How long did the State Patrol furnish meals, Mr. Mayo?

A. I believe we started paying subsistence on or about the 15th of October or 1st of October, 1937.

The Patrol went out on organization about the 1st day of September, 1937.

Q. In other words, a period of maybe 45 days?

A. Approximately, yes.

Q. In this report dated September 1, 1937, does the Board authorize in that, or the report to the Board of the Department of Public Safety, is there anything said in there concerning the changing of meals furnished to subsistence payments?

A. To the best of my knowledge, it does not.

Q. That report, I mean that sentence that you read previously into the record, that was from the report to the Board of the Department of Public Safety, was it not?,

A. Yes, sir.

Q. And it was a letter on a report signed by Clement A. Sutton, Acting Secretary and Special Counsel?

A. Clement E. Sutton.

Q. That is not actually any of the Minutes of the Board, is it?

A. Insofar as them being included in the Minutes of the Board, it is, but as a Board meeting, it is not.

Q. It is a copy of a report that was sent to the Board?

Mr. Russell:

They were approved as Minutes, I mean it was approved at the Minutes of the next meeting.

By Mr. Wolff:

Q. Following the report, what is the date of the next Minute appearing in the Minutes Book?

A. Ten o'clock, September 4, 1947.

Q. Is there anything in that record concerning the changing of subsistence to meals or changing from meals to subsistence?

A. I don't find any such.

Q. What is the date of the next Minute, Mr. Mayo?

A. Four-thirty pm., Wednesday, November 3rd

Q. Is there anything stated in those Minutes concerning the changing from meals to subsistence?

The Court:

What are you trying to get at, Mr. Wolff?

Mr. Wolff:

That it is not in the Minutes.

Mr. Mayo has testified that the Board approved the changing from the meals to subsistence payments, and I just want to bring out that it is not reflected in the Minutes Book if the Board did so rule.

The Court:

Well, can't we stipulate that? That it is not in this Minutes Book?

Mr. Arnold:

If it is not in there. I really don't know, Your Honor. Yes, we can stipulate that. I wouldn't mind that at all.

Mr. Russell:

We would be delighted to, Your Honor, if you will also include that it does show some five or six in-

stances where that subsistence was increased from time to time on various dates.

The Court:
All right. Can you stipulate that?

Mr. Wolff:
That was increased by legislation, was it not?

Mr. Russell:
No, sir; it is increased by those Minutes there.

Mr. Arnold:
You see, the Legislature fixed a minimum and then the Board itself increased that minimum according to the necessities. The Act itself, the law fixes it. For instance, like in '52, in Mr. Magness' case, they fixed a minimum of $4 and not over $5. So that was why, if Your Honor please, that the boys were trying to test out what the exact subsistence was in '52. That is when the Board fixed it.

The Witness:
If I might say a word there?

The Court:
Just a minute.

Mr. Wolff:
I would be willing to stipulate that if I have it.

Mr. Russell:
If Your Honor please, I will just read into the record the dates that they were increased.

Mr. Wolff:

I would be willing to stipulate, Your Honor, that during the period covered by these Minutes, which start in 1937 and, apparently, cover up through the present period, that there are several entries in the Minutes Book showing an increase in subsistence gradually over the years.

The Court:

Is that what you want to show?

Mr. Russell:

Yes, sir; from $1 to $5.

The Court:

Very well, it is so stipulated.

Mr. Wolff:

I wanted to make sure that it was in the record, Your Honor, that it is stipulated also that it does not appear in the Minutes where the Board authorized the changing from meals to subsistence.

Mr. Russell:

Your Honor, we would like to qualify that. We will stipulate that we can't find it at the present time. We couldn't stipulate that it is not in the Minutes, but we will stipulate at the present time we can' find it.

By Mr. Wolff:

Q Go back to the Minutes of November 3 1937, Mr. Mayo.

Do you see in there where the Board authorized the changing of meals to subsistence payments?

The Court:

Well, now, are you going to have him go all the way through the whole Minutes Book?

Mr. Wolff:

No, Your Honor; he testified that this system was discontinued October 15, 1937. Now, this is the first meeting appearing after October 15, 1937.

The Court:

Very well.

Mr. Wolff:

And I thought I might cover these Minutes and the following Minutes, the next two periods.

The Witness:

I don't find anything in the Minutes here that covers that, but we could very well have been authorized by letter by the Governor or the Commissioner of Public Safety, either one, that would not necessarily appear in the Minutes setting this thing out. After all, we were brand new.

By Mr. Wolff:

Q. What are the next Minutes appearing, Mr. Mayo?

A. April 28th, 1938.

Q. Does such authorization to change from meals to subsistence appear in those Minutes?

A. No. I don't see that it does.

Mr. Wolff:

No further questions, Your Honor

Mr. Arnold:

Now, if Your Honor please, in order that I may explain it, this is the Act, the Georgia Act of 1951.

The Court:

Well, you can take care of that on your brief.

Mr. Arnold:

Yes, sir. I know that, if Your Honor please, but I wanted to explain, I wanted to get this in the record if I could.

The Court:

What, the law?

Mr. Arnold:

In connection with just exactly what they are testifying about.

The Court:

I think I understand the testimony.

Mr. Arnold:

Yes, I know you do. All right.

Re-Direct Examination.

By Mr. Arnold:

Q. Mr. Mayo, where were the Troopers at the Atlanta Post stationed at that time? You didn't have any Barracks here. Where were they stationed?

A. To the best of my knowledge, we set up cots out there at the Department, I believe.

Q. Well, prior to that—

A. Before they—prior to the—

Q. Setting up, moving out to the Barracks.

A. We kept them in Barracks out here at Georgia Tech.

Q. At Georgia Tech?

A. Yes, sir.

Q. Now, that was the Troopers here in Atlanta?

A. Yes, sir.

Q. At this Post?

A. Yes, sir.

Q. Now, where were they fed, if you remember?

A. I don't remember where they were fed at the time.

Q. They were fed here in town?

A. Yes, sir.

Q. Now, I believe you said something about a policy of married people.

What was that? Their wives couldn't what?

A. I think it was more or less the ruling of Major Carter that he wouldn't allow any of the wives to come to the Patrol area or where the men were stationed at that time until they were there for six months, and then they were moved immediately after they got there.

Q. Now, I will ask you, here on the Minutes dated November 3, 1937, that last paragraph, read it and tell us what it means.

Before you answer, let him look at it.

Mr. Wolff:

Those are the Minutes of November 3, 1937?

The Witness:

"Authority to Pay Captain Robert G. Mayo, Treasurer, $15 a month lodging was approved due to in-

sufficient quarters to house all officers and Patrolmen."

By Mr. Arnold:

Q. Now, you mentioned you belonged to the Headquarters staff?

A. Correct, sir.

Q. Well, now, the Headquarters staff, Mr. Mayo, is it true or not true that they have a lot of traveling to do?

A. Oh, yes, we had lots of traveling to do.

Q. Most of the time or at least 50 per cent of the time they were on the road?

A. Yes, sir; as I so stated.

Q. And you didn't have any regular place or barracks, I mean so far as eating was concerned. You ate wherever you were, is that correct?

A. That is correct; yes, sir.

Q. And wasn't it the system then to make requisition on the Treasurer for your meals?

A. Yes, sir.

Mr. Arnold:

He is with you.

Re-Cross Examination.

By Mr. Wolff:

Q. Did you live at home, Mr. Mayo, at the time the Troopers were quartered out at Georgia Tech?

A. Yes, sir.

Q. Did you ever live in any barracks?

A. No, sir.

Mr. Wolff:
No further questions.

The Court:
All right, Mr. Mayo.

(Witness excused.)

Mr. Arnold:
We rest, Your Honor.

Mr. Wolff:
Respondent rests, Your Honor.

The Court:
All right, I think simultaneous briefs will be all right in this case.
How much time do you want?

Mr. Wolff:
I have got two briefs due, Your Honor, before April 30th.

The Court:
60 days?

Mr. Wolff:
Yes, Your Honor.

Mr. Arnold:
Sixty days will be fine. I have a lot of local work to do, as far as that is concerned, but I think we can make our brief in 60 days.

The Court:
All right, and 15 is enough for reply, is it?

Mr. Arnold:
I think it is.

The Court:
Mr. Jones will give you the dates.

Mr. Arnold:
I imagine the copies of the brief will be furnished; in other words, if when I make my brief, I will send in a copy and he will send me a copy; then, we ought to have some little time to study it, because we might be tied up in Court and away from home.

The Court:
Well, the briefs are sent to Washington and then they are served on you, on the opposing parties, from the Clerk's Office in Washington. If you find that 15 days is insufficient time for your reply brief, why, you can mail me a motion for an extension.

Mr. Arnold:
What I was driving at was, if he would send me a copy, when he sent me a copy, then, when I sent my brief to Washington, I would send him a copy; then 15 days would be an adequate time for us to study those briefs and make our replies.

The Court:
I will leave that up to you gentlemen to work out between you.

Mr. Arnold:
Are you willing to do that?

Mr. Wolff:
Yes.

Mr. Arnold:
That suits me, then.

The Court:
All right. We will stand at recess until ten o'clock.

(Whereupon at 9:40 o'clock, a. m., the hearing in the above-entitled petition was closed.)

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26 T. C. No. 125

Tax Court of the United States.

Harold Brannon Magness, Petitioner,
v. Docket No. 55503.
Commissioner of Internal Revenue, Respondent.

Filed August 31, 1956.

Held, the subsistence allowance received by petitioner, a member of the Georgia State Patrol, was additional compensation within the meaning of section 22 (a) of the 1939 Code.

James W. Arnold, Esq., for the petitioner.

Herman Wolff, Jr., Esq., for the respondent.

This proceeding involves a deficiency in income tax for the year 1952 in the amount of $341.

The sole issue is whether a subsistence allowance which the petitioner received was additional compensation within the meaning of section 22 (a).

Findings of Fact.

Petitioner was a resident of Winder, Georgia, during the year in issue and filed his individual income tax return for such year with the former collector of internal revenue for the district of Georgia.

During 1952, petitioner was a highway patrolman with the Georgia Department of Public Safety. His station was in the City of Athens, Georgia, a distance of approximately 25 miles from his home.

As a member of the State Patrol, petitioner was required to live in a barracks in Athens and was subject to call 24 hours a day, every day in the year. He was entitled to a 24-hour pass one day each week and to a two week vacation. When off duty, he was required to advise his headquarters of his whereabouts at all times.

In addition to his regular salary, petitioner received, in every pay check, an amount denominated as subsistence. Such amount was paid to him at the rate of $4.50 per day for every day of the year regardless of whether or not he was on active duty. Such amount of subsistence was paid to members of the State Patrol for the purpose of defraying the cost of their meals. Patrolmen purchased their meals at

any public restaurant of their choice along the route of their patrol duty. They could eat at any time they chose while on duty but were required to notify their headquarters of their exact whereabouts. During the year in issue, petitioner received a total of $1,647 for per diem subsistence, but he did not report such sum on his income tax return.

In his deficiency notice, the respondent determined that such sum constituted additional taxable compensation.

Opinion.

Rice, Judge: This case narrows to a question of whether we shall adhere to two previous holdings of this Court, Charles H. Hyslope, 21 T. C. 131 (1953); and Robert H. Saunders, 21 T. C. 630 (1954), revd. 215 F. 2d 768 (C.A. 3, 1954),—holdings adverse to th position the petitioner takes here—or whether we shall adopt the views of the Court of Appeals in its reversal of Robert H. Saunders, supra. The petitioner contends that the facts here closely parallel those of the Saunders case, while the respondent contends that they are more akin to those of the Hyslope case. In view of those arguments, we say at the outset, with due deference to the Court of Appeals, that we fail to see any distinction in principle between those cases and the one here. If the subsistence allowance received by Patrolman Hyslope was taxable gross income to him under section 22 (a), so it was to Patrolman Saunders, and so it is to the petitioner.

In Charles H. Hyslope, supra, we held that the sum which the taxpayer received in addition to his regular

salarly, as reimbursement for the expense of uniforms, maintenance, telephone, lodging while away from home, and meals eaten during his daily tour of duty, constituted additional gross income. We also denied a deduction of the amount actually spent for the purchase of meals during his daily tours of duty on the ground that the taxpayer there was in no essentially different position from the average worker who was unable to have one of his meals at home. In Robert H. Saunders, supra, on similar facts, we reached a like conclusion. The Court of Appeals reversed our holding in Robert H. Saunders, supra, on the ground that the subsistence allowance which the taxpayer received was paid to him for the convenience of his employer, the State of New Jersey. That, it said, was so because by paying the taxpayer a subsistence allowance and permitting him to purchase his meals at a public restaurant, the quality of the State Highway Patrol system was improved. The Court noted that when the State furnished meals to its patrolmen, a majority of them ate at the same time, and the highways were consequently either not patrolled at all or were inadequately patrolled during that particular time of day.

In the course of its opinion, the Court of Appeals made a careful review of the so-called convenience of the employer doctrine. Clearly, that doctine is an administrative ingrafting of an exclusion from gross income onto those exclusions specifically set forth in section 22 (b). While we have no quarrel with the doctrine, as such, we think by its very nature, being an exception to the broad coverage of section 22 (a), it must be sparingly applied. We did not think that the subsistence allowances received by Patrolmen Hy-

slope and Saunders were paid to them for the convenience of their employers, nor do we think that the subsistence allowance received by the petitioner here was paid by the State of Georgia for its convenience.

The Supreme Court has repeatedly held that section 22 (a) of the 1939 Code is broad enough to include in taxable income any economic or financial benefit conferred on an employee as compensation, whatever the form or mode by which it is effected. Commissioner v. Smith, 324 U. S. 177 (1945). The Commissioner's regulation setting forth the "convenience of the employer" doctrine clearly recognizes the all-encompassing nature of section 22 (a). Regulations 111, section 29.22 (a)-3[1] provides that if a taxpayer receives living quarters or meals in addition to his cash salary, the value of the quarters and meals so furnished ordinarily constitute taxable income to him. Here it is to be remembered that no meals were actually furnished by the State to the petitioner; but, in lieu thereof, he received a per diem subsistence allowance out of which he might purchase his meals

[1] Regulations 111.

Sec. 29.22(a)-3. Compensation Paid Other Than in Cash.—* * * If a person receives as compensation for services rendered a salary and in addition thereto living quarters or meals, the value to such person of the quarters and meals so furnished constitutes income subject to tax. If, however, living quarters or meals are furnished to employees for the convenience of the employer, the value thereof need not be computed and added to the compensation otherwise received by the employees. * * *

at a public restaurant of his choice. He also received the allowance whether he was on duty or off duty. With no more regulation by his employer as to the time, the manner, and the place at which he ate his meals, the subsistence allowance which the petitioner received was clearly additional compensation.

Simply because he was on call by his employer 24 hours a day, we fail to see why the Treasury should underwrite tax exempt meals for this petitioner. If that were so, any employer could denominate a part of any employee's salary as subsistence for the latter's lunch-time meal on the theory that, even though the employee was allowed a period of time to eat his lunch, he was subject to call by his employer. Merely stating that proposition refutes it. Yet, we see no essential difference in that hypothetical situation and the one before us here. The cost of a taxpayer's meals is a personal expense, whether eaten at home or in a public restaurant. We dare say that a majority of all taxpayers find it necessary to eat at least one meal away from home, some two, and this petitioner apparently all three. But we do not find that the petitioner's eating of meals in a restaurant of his choice, which he paid for from that part of his total compensation denominated as subsistence, should result in favored tax treatment denied to all other taxpayers who are employees and eat one or more meals away from home.

Decision will be entered for the respondent.

DECISION.

The Tax Court of the United States.

Washington.

Harold Brannon Magness, Petitioner,
v. Docket No. 55503.
Commissioner of Internal Revenue, Respondent.

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, filed August 31, 1956, it is

Ordered and Decided: That there is a deficiency in income tax for the taxable year 1952 in the amount of $341.

(Sgd.) STEPHEN E. RICE,
Judge.

(Seal)

Entered Sept. 5, 1956.

Filed Oct. 23, 1956.

(Title Omitted.)

Petition for review of the decision in the above case by the Tax Court of the United States, determining that a deficiency existed of $341.00 for the taxable year 1952.

By JAS. W. ARNOLD,
Attorney of record for petitioner.

P. O. Box 508,
Athens, Georgia.

In the United States Court of Appeals, Fifth Circuit.

Harold Brannon Magness, Petitioner,
vs.
Commissioner of Internal Revenue, Respondent.

Tax Court Docket No. 55503.

Now comes Harold Brannon Magness, the tax payer, by and through Jas. W. Arnold, his attorney of record in the above case, files his petition for review by the United States Court of Appeals, Fifth Circuit of the decision by the Tax Court of the United States, Ordered, Decided, and Entered September 5th, 1956, determining, that there was a deficiency in the income tax of the above petitioner, for the taxable year 1952 in the amount of $341.00 and respectfully shows:

1. That the United States Court of Appeals, Fifth Circuit has jurisdiction of this case for review pursuant to the provisions of Section 1141 of the Internal

Revenue Code; the tax payer having made and filed his annual income tax returns for the taxable year 1952 in the office of the Collector of Internal Revenue for Georgia, at Atlanta, Georgia.

2. That petitioner, the tax payer is an individual, whose home address is, R.F.D., Winder, Barrow County, Georgia, and who was during the taxable year 1952 a member of the uniform division of the Department of Public Safety of Georgia, known and designated as, "The Georgia State Patrol", and was stationed during the year 1952 at the Athens Georgia Post of said patrol, a distance of 26 miles from his home address.

3. That the nature of the controversy here involves a proper determination of petitioners's liability for Federal Income Tax for the Calendar year 1952.

Petitioner received a salary for 1952, but the salary is not here involved, as the taxes for the income from salary was duly paid at the time of filing his annual returns. The sole question here is; whether a subsistence allowance to petitioner in addition to his salary, by the State of Georgia, paid to him separately from his salary, under circumstances as petitioner contends, was not for the personal convenience, comfort or pleasure of petitioner, but solely because he could not otherwise perform the services required of him by the State, his duties being continuous and required his presence at all times. He was not only required but compelled to occupy the barracks at the Athens Post of the Georgia State Patrol, and the subsistence was furnished him by the State in lieu of meals in kind, which had formerly been prepared at

the Post and eaten at the Post; this method, petitioner contends was changed by the State to effect a saving to the State in money and to improve the quality of the patrol system, by releasing the men for patrol duty at a time when they would otherwise be congregated at the post for meals, and was therefore for the benefit and convenience of the State of Georgia, employer of petitioner. This in substance is the issue.

4. Petitioner, the taxpayer, being aggrieved at the findings of facts and conclusions of law contained in said findings and opinion of the Tax Court, and its decision entered pursuant thereto, desires to obtain a review thereof by the United States Court of Appeals, Fifth Circuit, comes now and contends, that the Tax Court erred in the following particulars to wit:

1st; in holding that the Syslope case, 21 T.C. 131 (1953) and the Robert H. Saunders case, 21 T. C. 630, (1954) and the case at bar were not distinguishable in principle; saying, "If the subsistence allowance received by Patrolman Hyslope was taxable gross income to him under Section 22(a), so it was to Patrolman Saunders, and so it is to Petitioner (case at bar)" Hyslope was an Indiana State Patrolman, the holding of the Tax Court in his case was not appealed from, therefore it became the law of that case. The Saunders Case, a New Jersey Patrolman, was appealed to the United States Court of Appeals, Third Circuit, and was by that Court reversed, see, 215 Fed. 2nd, 768. It is petitioner's contentions, (a), that the Hyslope case is so distinguishable on the facts from that case at bar, that the same principle of law cannot be applied to the two cases. (b), that the Saunders

case, and the case at bar are more nearly parallel cases on the facts, and therefore, the Tax Court is bound by the decision in that case, and not to follow it in the case at bar, is to repudiate it, which petitioner contends, the Tax Court cannot do, and was error, and contends;

1; that the decision here complained of, is contrary to the law and is not supported by the law.

2nd; that the decision is decidedly and strongly against the evidence and the law, and against the weight of the evidence and the law.

3rd; that the decision is contrary to the law and the evidence, and contrary to the principles of justice, and has the effect of overruling the decision in the Saunders case supra by the United States Court of Appeals, Third Circuit.

4th; that the Tax Court did not base its findings upon its independent judgment on the facts and law of the case at bar, but by adoption of its view in another case or cases, one of which of these cases, had been reversed, (Saunders case supra) the other case had not been appealed, and petitioner contends, that this was error and says, that the Tax Court should have considered, and adjudged the case at bar upon its own merits, independent of the Court's opinion in some other case and was error.

5th; petitioner comes now and names himself as appellant and names the Commissioner of Internal Revenue as appellee herein, and shows, that material to a clear understanding of the errors herein com-

plained of are the following portions of the record to wit:

1st: The docket entries of the proceedings before the Tax Court.

2nd: All pleadings before the Tax Court.

3rd: Findings of Fact, Opinion, and Decisions of the Tax Court.

4th: Petition for Review.

5th: A brief of the evidence as agreed upon by the parties, which is to include all documentary evidence.

Petitioner prays: That the decision of the Tax Court be reversed and it be determined, that no deficiency for 1952 be due by petitioner.

(Sgd.) JAS. W. ARNOLD,
Counsel of Record for Petitioner.

Address:
Box 508, Athens, Georgia.

Georgia,
Clarke County.

I, Jas. W. Arnold, being first duly sworn, says that he is counsel of record in the above named cause; that as such counsel he is authorized to verify the foregoing petition for review; that he has read said petition and familiar with the statements contained

therein; and that said statements made are true to the bes of his knowledge, information and belief.

(Sgd.) JAS. W. ARNOLD.

Sworn to and Subscribed Before Me, this 29 day of September, 1956.

(Sgd.) GUY B. SCOTT, JR.,
Notary Public, Clarke County, Georgia.

(N. P. Seal)

NOTICE OF FILING PETITION FOR REVIEW.

Filed Oct. 23, 1956.

(Title Omitted.)

To: John Potts Barnes,
Chief Counsel,
Internal Revenue Service.

You are hereby notified that the above-named petitioner did, on the 23rd day of October, 1956, file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Court of Appeals for the Fifth Circuit, of the decision of this Court heretofore rendered in the above entitled case. Copy of the petition for review as filed is hereto attached and served upon you

Dated this 23rd day of October, 1956.

(Signed) HOWARD P. LOCKE,
Clerk, The Tax Court of the United States.

Service of copy of Petition for Review acknowledged this 23rd day of October, 1956.

(Signed) JOHN POTTS BARNES, CAB,
Chief Counsel, Internal Revenue Service, Attorney for Respondent.

PRAECIPE FOR RECORD.

Filed Oct. 23, 1956.

(Title Omitted.)

To the Clerk of the Tax Court of the United States:

You are hereby requested to prepare and certify and transmit to the Clerk of the United States Court of Appeals, Fifth Circuit, with reference to petition for review heretofore filed by petitioner in the above cause, a transcript of the record in the above cause, prepared and transmitted as required by law and by the rules of said Court, and to include in said transcript of record the following documents or certified copies thereof, to wit:

1st; The Docket entries of all proceedings before the Tax Court.

2nd; Pleadings before the Tax Court of the United States, as follows:

(a) Petition for Redetermination.

(b) Answer of Respondent.

3rd; The Findings of Fact and Opinion of the Tax Court of the United States.

4th; The Decision of the Court.

5th; The Petition for Review, filed by petitioner in the above cause.

6th; The Statement of Evidence, with Exhibits 1.2 thru 13 and A attached thereto.

7th; This Praecipe.

(Sgd.) JAS. W. ARNOLD,
(Jas. W. Arnold),
Counsel of Record for Petitioner.

Service of a copy of the foregoing designation acknowledged this 23rd day of October, 1956.

(Signed) JOHN POTTS BARNES, CAR,
Chief Counsel, Internal Revenue Service, Attorney for Respondent.

MOTION FOR TRANSMISSION OF TESTIMONY AND OF ORIGINAL EXHIBITS.

Filed Nov. 16, 1956.

In the United States Court of Appeals for the Fifth Circuit.

Harold Brannon Magness, Petitioner on Review.
v. T. C. Docket No. 55503.
Commissioner of Internal Revenue, Respondent on Review.

Come now the parties to the above-entitled proceeding by their counsel of record, and move:

1. That the original transcript of the testimony taken before the Tax Court of the United States in Atlanta, Georgia, on April 9, 1956, as designated in praecipe for record, in lieu of a narrative statement of evidence, be made a part of the transcript of record in this cause to be filed with the Court, said original transcript to be returned to the Tax Court when it has served the purpose of this Court.

2. That the originals of Petitioner's Exhibit 1 through 13 and Respondent's Exhibit A, instead of being fully set forth in the transcript to be certified by the Tax Court to this Court, may be transmitted by the Tax Court to this Court.

3. That said exhibits need not be printed in the record on review herein but may be referred to by counsel in their respective briefs and on oral argument, or reproduced, in whole or in part, in an appendix to their respective briefs, and considered by the Court with the same force and effect as if included in the printed record on review.

4. That the exhibits are to remain in custody of the Tax Court until ten days prior to the hearing before this Court, and upon direction of counsel for petitioner, to be then transmitted by the Clerk of the Tax Court to this Court.

So Ordered:

(S.) WAYNE G. BORAH,
U. S. Circuit Judge.

November 14, 1956.

(S.) JAS. W. ARNOLD,
Counsel for Petitioner on Review.

Box 508,
Athens, Georgia.

(Signed) CHARLES K. RICE, CAR,
(Charles K. Rice),
Assistant Attorney General.

(Signed) JOHN POTTS BARNES, CAR,
(John Potts Barnes),
Chief Counsel, Internal Revenue Service, Counsel for Respondent on Review.

A true copy.

Test:

JOHN A. FEEHAN, JR.,
Clerk, U. S. Court of Appeals,
Fifth Circuit,
By (Sgd.) CLARA R. JAMES,
(Seal) Deputy.

New Orleans, Louisiana, Nov. 14, 1956.

CERTIFICATE.

The Tax Court of the United States.
Washington.

Harold Brannon Magness, Petitioner,
v. Docket No. 55503
Commissioner of Internal Revenue, Respondent

I, HOWARD P. LOCKE, clerk of The Tax Court of the United States do hereby certify that the foregoing pages, 1 to 108, inclusive, contain and are a true copy of the papers of record, on file in my office as called for by the Praecipe and Order of the Appellate Court in the appeal as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 7th day of December, 1956.

HOWARD P. LOCKE,
(Seal) Clerk, The Tax Court of the United States.

LIBRARY
SUPREME COURT, U.S.

FILED
DEC 16 1957
JOHN T. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1957

NO. 672

HAROLD BRANNON MAGNESS, *Petitioner*

Versus

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

Petitioner for writ of certiorari to the United States Court of Appeals for the Fifth District

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JAS. W. ARNOLD,
Attorney of record, for petition
P. O. Box 508, Athens, Georgia

ROBT. L. RUSSELL, JR.,
RUSSELL, VANDIVER & RUSSELL,
Winder, Georgia

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

NO. 16,430

HAROLD BRANNON MAGNESS, PETITIONER

VERSUS

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Petitioner, Harold Brannon Magness, by and through his attorney of record, Jas. W. Arnold, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit entered in the above cause on August 13th, 1957, and motion for a rehearing denied Sept. 30, 1957.

OPINION BELOW

The opinion of the Court of Appeals (Appendix A, infra page 12, is reported at A. S. 247 Fed. 2d 740.)

JURISDICTION

The judgment of the Court of Appeals was entered on August 13, 1957, and rehearing denied September 30, 1957, (Appendix B, infra page 19.)

The time for filing a petition for writ of certiorari was extended by Mr. Richard T. Rives, United States Circuit Judge for the Fifth Circuit October 12, 1957, to 90 days after September 30, 1957. (Appendix C, infra page 20.) The jurisdiction of this court is invoked under U. S. C. A. 28 1254 (1), Internal Revenue Code 1954, Sec. 7482. The jurisdiction of the Court of Appeals, Fifth Circuit, was complete in the case here appealed from, (Appendix D, infra page 23.)

QUESTIONS PRESENTED

(a.) Is the amount received by petitioner, a State Trooper of the State of Georgia, as a subsistence allowance in lieu of rations (meals) for the year 1952 included in his gross income as additional compensation within the meaning of Sec. 22 (a) of the Internal Revenue Code of 1939?

OR

(b.) Does the amount of subsistence received by petitioner, a State Trooper of the State of Georgia, as subsistence allowance in lieu of rations (meals) for the year 1952, come within the meaning of the second paragraph of Sec. 39.22 (a)-3 of Regulations 118 (applicable in 1952) which reads as follows: "If, however, living quarters or meals are furnished to employees for the convenience of the employer, the value thereof need not be computed and added to the compensation otherwise received by the employee."

CONFLICT AMONG COURTS

The writ of certiorari should issue, here, because of the conflict in the case of Robert H. Saunders, petitioner, versus Commissioner of Internal Revenue, Docket no. 11.291, United States Court of Appeals for the Third Circuit, as reported in 215 Fed. 2d 768, with the case of Harold Brannon Magness, Docket no. 16.430, United States Court of Appeals, Fifth Circuit, (The case here appealed from) as reported in the advance sheet of 247 Fed. 2d 740. Saunders being a State Trooper of the State of New Jersey and Magness, likewise, being a State Trooper of the State of Georgia and the issue in both cases being (whether subsistence furnished to each trooper in cash in lieu of rations (meals) should be included in gross income. Thef acts being the same in substance and certainly the law identically the same, this court should hear and determine which of these Circuit Courts rendered the correct decision.

REGULATIONS AND STATUTES INVOLVED

The regulations invloved pertinent to the issue here, is the 2nd Sec. of paragraph one of Sec. 39.22 (a)-3 of Treasury Regulation 118 as follows; "If, however, living quarters or meals are furnished to employees for the convenience of the employer, the value thereof need not be computed and added to the compensation otherwise received by the employer."

The statute involved; Title 26 Sec. 22, Internal Revenue Code, (1939) "Gross Income."

(a.) General definition—Gross income includes gains, profits and income derived from salaries for personal services *** of whatever kind or in whatever form paid.

GEORGIA STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the applicable statutes and regulations are set forth in Appendix E. infra page 24.

STATEMENT

During the year 1952 and all times here involved, petitioner was a highway patrolman with the Department of Public Safety for Georgia. His station was in the City of Athens, Georgia, a distance of 25 miles from his home near Winder, Georgia. (R 23).

For the year 1952, the Commissioner of Internal Revenue issued a deficiency statement against petitioner for $341.00 assessed against the subsistence furnished petitioner by the State of Georgia for that year. The case was appealed to the Tax Court of the United States which upheld the assessment against petitioner by the Commissioner, holding that the subsistence allowance received by petitioner, a member of the Georgia State Patrol, was *additional compensation* within the meaning of Sec. 22 (a) of the 1939 Code, as reported in 26 T. C. no. 125 (1956).

Petitioner filed a petition to the United States Circuit Court

of Appeals for the Fifth Circuit to review the decision of the Tax Court upholding the determination of the Commissioner of Internal Revenue that a deficiency existed in the income tax liability of petitioner for the year 1952, being case no. 16.430 of that court, in the amount of $341.00. The Court of Appeals, for the Fifth Circuit, on August 13, 1957, affirmed the decision of the Tax Court and adhered to that decision of September 30, 1957, in overruling a motion for a re-hearing therein.

In the decision sustaining the findings of the Tax Court as reported in 26 T. C. 125 (1956), the Court of Appeals, decision reported in full in Appendix A, infra page 12, seemed to base its opinion and conclusion upon the following statement made by the Court as reported in the decision as follows: "The basic question stated very simply is, *were the subsistence payments income? Petitioner addressed himself to this problem as if there was no difference between a situation where an employer furnishes his employee with quarters in kind, meals in kind, or money in lieu of either,*" *and on page four of the decision said that Sec. 119 of the Internal Revenue Code of 1954 applies only to meals or lodging furnished in kind. Therefore, any cash allowance for meals or lodging received by an employee will continue to be included in gross income to the extent that such an allowance constitutes compensation.*"

SOME FACTS

As a member of the State Patrol, petitioner was required to live in a barracks in Athens, Georgia, and was subject to call 24 hours a day, every day of the year, including Sundays (R 25.41, 27, 69). Petitioner received a salary from the State of Georgia for the year 1952 of $2152.50 (R 18) which amount petitioner duly returned for taxes to the collector of Internal Revenue for Georgia and paid the taxes thereon. R 18). In addition to salary, petitioner received as subsistence $1647.00

paid to him in bi-monthly checks upon a basis of $4.50 per day, (R 26 and petitioner's exhibit no. 1). The State of Georgia did not deduct withholding tax from this subsistence (R 27-28). All troopers were allowed a 24 hour pass each week but could not get this pass on a day of the trooper's choice. That was left to the discretion of the Sergeant in chargeo f the station (R 34-42). In addition to a weekly pass, a trooper was allowed 15 days as a yearly vacation. (R 34). At all times whteher on a daily pass or vacation a trooper had to register with his station his whereabouts for every minute of his time, as he was subject to call at all times (R 34.) His vacation was assigned to him by the Director and at his discretion (R 41.) Petitioner stood inspection every morning in the station by the Sergeant and twice a week by the Lieutenant of the division (R 33). Petitioner could not get a daily pass or a day of his vacation between December 15 and January 5. (R 36). Petitioner had to keep his blankets, bed linen laundered, uniforms dry-cleaned and pressed, his belts, pistol scabbards, boots, shoes and brass cleaned at all times ready for inspection, all of this at his own expense. R 36). Petitioner often worked 16 and 18 hours a day (R 44). The Sergeant in command of the station made up a duty roster daily and placed it on the bulletin board which informed petitioner when he came in to the station off of his patrol, where he would patrol the following day (R 42). Petitioner was required to eat his meals on the route assigned to him and at the nearest restaurant to him at meal time, but he must eat on his route and had to radio his station where he was eating when he started to eat and then when he had finished and if he had ordered a meal and before he finished eating it, an emergency arose, he would have to leave his meal uneaten, but had to pay for it. This happened to petitioner many times. (R 30-31-33). Petitioner never spent any of his subsistence for meals while on daily pass or vacation but his subsistence was spent on meals while he was actually on patrol duty (R 41).

CONTROLLING FACTS

The basic facts relating to the original plan of the State of Georgia to furnish meals in kind to the troopers and why it changed to one of furnishing cash in lieu of meals, is shown by the following record.

The Department of Public Safety of Georgia was created by an Act of the Georgia Legislature at the January-February session, 1937, was approved and became a law March 19, 1937 (Act 220, of that session, Acts 1937, pages 322-325).

Robert G. Mayo was its first treasurer and served as such from its formation until February, 1941, (R 58). At first the men were paid a monthly salary and their meals were furnished (R 60). When we organized the patrol, we had to place the men wherever we could find a place for them to sleep (R 64). The state furnished the meals to the troopers in some centrally located place, usually a boarding house (R 64). That was before barracks were built. This system proved to be impossible because of two things. First, the office work proved too voluminous to handle; second, it took the men off the road and left the area unpatrolled while the men came to a centrally located place to eat. The state then changed it to a subsitsence type of pay and paid it bi-monthly, a salary and subsistence (R 64-65-66).

The Court: "Let me see if I understand that last answer? Was it that it was more expensive to the State to do it the way you started than the subsistence?"

The Witness: "Yes, your honor, it was absolutely more expensive." (R 66).

It was then stipulated as follows: "That the minutes of the Board (Board of the Department of Public Safety) during the period covered by the minutes which start in 1937 and cover up to and through the present period, *that there are several entries in the minute book showing increase in subsistence gradually over the years from $3.00 to $5.00 per day* (R 73).

REASONS FOR GRANTING THE WRIT

The basic questions presented in this case are: 1st, the conflict between the decisions in the United States Court of Appeals, Third Circuit, in the case of Robert H. Saunders, a New Jersey State Patrolman, with that of the Harold Brannon Magness case, a Georgia State Patrolman, in the United States Court of Appeals, Fifth Circuit, both cases are in substance based upon the same facts and are controlled by the same law. The Court of Appeals in the Saunders case holding, that subsistence in kind and cash in lieu thereof, was no different in substance and that the subsistence paid to Saunders was not compensation. The Court of Appeals in the Magness case (the case at bar) holding that there was a difference between subsistence in kind and cash in lieu thereof and that any cash allowance for meals or lodging received by an employee will continue to be includable in gross income to the extent that such allowance constitutes compensation. The Court of Appeals in the Magness case invoking Sec. 119 of the Internal Revenue Code of 1954, which was not passed by Congress until two years after the assessment against Magness was made for the year 1952 and did not take effect until December 31, 1953, and was never intended to be given retro spective operation because: unless the contrary intention plainly appears a statute operates prospectively only, as is shown by decisions of the Supreme Court in the following cases: Joseph W. Cox, appellant, v. Ethel Hart, 67 Law Ed. 332 (2) U. S. v. Dixon, 10 Law Ed. 689, Barnitz v. Beverly, 41 Law Ed. 94. The criterion being something done sanctioned by the subsequent act (1954) but was not sanctioned by the former act (1939) when done. Cummings v. Missouri, 4 Wall 277, 18 Law Ed. 356.

Second; In 1925, the Court of Claims held in Clifford Jones v. United States, 60 Ct. of Claims 552, 5 A. F. T. R., 5297, that an army officer was not required to include in his gross income for the year 1923 * * * *cash allowance in lieu of quarters* paid to him during that part of the year when Government quarters were not available upon the premise that the

occupancy of Government quarters by Army officers is a *requisite* to the proper performance of their duties. The United States Government, in that case, contended that the value of the quarters was worth $940.00 and that the $500.00 cash received by Jones in lieu thereof, totaling $1440.00 should be included in his gross income and fixed that amount in his assessment which was paid by Jones, and then brought suit in the Court of Claims for its recovery. The court made an exhaustive analysis of the applicable statute and Army regulations and arrived at four fundamental conclusions pertinent to the cause at bar. Pertinent to this case is Section 4 of those conclusions as follows:

"The Court pointed out that petitioner (Jones) had no choice between accepting quarters in kind or cash in lieu thereof *** in the Court's view, the *money allowance was no different in substance from the original purpose of the allowance in kind.* The Court asked this question, " Could such an allowance be considered income?" and concluded that it could not. In the Jones case the Government relied upon the statutory definition of income contained in Section 213 of the Revenue Act of 1921, which is the same as the present Section 22 of the Code of 1939. Later, the Treasury Department accepted the Jones decision and limited its application to the enlisted personnel and officers of the Army, Navy, Coast Guard, Coast and Geodetic Survey and the Public Health Service, and incorporated it in its rules and regulations (Regs. 77, Art 53; Regs. 86-94, 101, Art 22 (a)-2; Regs. 103, Sec. 19.22 (a)-3; and Regs. 111, Sec. 29-22 (a)-3 now Regs. 118 39.22 (a)-3.)

This question of compensation has been before the Supreme Court many times. In the United States v. Smith, 158, U. S. 346, clearly distinguished between allowances which forms a part of the compensation and those allowances which serve to to reimburse expenditures made. In its conclusions the Court said:

"Pay is a fixed and direct amount given by law to persons

in the military service in consideration of any and as compensation for their personal service. Allowances as they are called or emolutants as they were formerly termed, are indirect or contingent remuneration which may or may not be earned and which is sometimes in the nature of compensation and sometimes in the nature of reimbursement."

In United States v. Mills, 197, U. S. 223-227, the Supreme Court had before it the question of computation of longevity, pay due an officer of the army. In the discussion, the following language was used:

"The words *pay proper* we see no reason to think or to be construed differently from the word *pay*. The term means compensation, which may properly be described or designated as pay, as distinguished from allowances, computation for rations or other methods for compensation not specifically described as pay."

In the Jones case, supra, the Court of Claims in the body of the decision said: "In our view of the case what was said in the Mills case is a clear exposition of the fundamental distinction between *pay* and *allowance*. Therein, it is pointed out in the line of demarcation between pay, allowances and other methods of compensation, the court improvised by specification and generalization what Congress intended by use *pay proper*.

Federal District and Circuit Judges receive an allowance, not to exceed $10.00 a day when absent holding court away from their homesfl Allowances of this character are clearly intended as reimbursement and form no part of the Judge's compensation.

Smith v. Jackson, 241, Fed. 747. 246 U. S. 388. Congress actually appropriates certain sums for the Executive Department and likewise a travel allowance. Such appropriations have not been and are not charged against the President as compensation. Members of Congress receive certain allowances. This court determined with reference to indication that the allowances were not part of their compensation. Wilson v. U. S., Court of Claims 428. A vast number of government employees re-

ceived travel expenses and fixed sums in lieu of subsistence when away on government affairs. Clearly, such allowances are for purposes of reimbursement.

In the case of Gould v. Gould 245 U. S. 151, the Supreme Court said: "In the interpretation of statute, levying taxes it is the established rule not to extend their provisions by implications beyond the clear import of the language used or to enlarge the operation."

The Jones case, supra, is reported in full on page 5297 in Amended Federal Tax Report, volume 5.

It is apparent by the Legislature of Georgia from the points made in creating and setting up the Department of Public Safety, of which the State Patrol is an integral part, that specific provisions there are made regarding the distinction between pay and compensation to be paid to the State Troopers and the allowances such as quarters, rations, and cash disbursements in lieu thereof, are not part of their compensation. It is made clear by the record herein that the State of Georgia, first intended to erect barracks, set up kitchens in which to feed the troopers and house them. It was found early in the procedure of these effects that to feed the men in a centrally located place would take the troopers off the patrol during the time of eating their meals and leaving the area unpatrolled. The State of Georgia, employer herein, saw that by this method it could not render to the public the services that the public lic required and thereby made a change to one requiring the troopers tol ive in the barracks but to eat their meals on the patrol route, thereby keeping the troopers at all times on the patrol and furnishing them cash for their meals. We contend that the cash so furnished was no different from a reimbursement for the meals and was done for the convenience of the State of Georgia in order that the trooper could better perform his duties. The change was a matter of necessity so that the state could render its greatest service to the public.

The Tax Court of the United tSates, in the Gunnar Van Rosen case as reported in 17 T. C. 834 (1951) held, that the

principle in the Jones case should be limited to the military personnel, and has held steadfastly to that principle in every case since, including the Saunders case, supra, and the Magness case at bar. Van Rosen was a civilian employee of the Army Transportation Corps and worked under a negotiated contract that included salary and allowance.

This Court should hear and determine whether or not, (a) the Treasury Department can limit the effect of a case that has been judicially determined, by including its own interpretation in a regulation. (b) This Court should hear and determine whether or not the Tax Court can place its own interpretation upon a case judicially determined, and thereby limit its effect, and by so doing, convert it into a law of a class, such as the Jones case, supra. by determining, that the principle of the Jones case should not be extended further than to the military personnel, (Van Rosen case, supra.)

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

James W. Arnold
Attorney of record for petitioner

Robert L. Russell, Jr.
Russell, Vandiver and Russell
Winder, Georgia

APPENDIX "A"

In the United States Court of Appeals, for the Fifth Circuit

No. 16430

Harold Brannon Magness, Petitioner

versus

Commissioner of Internal Revenue, Respondent.

Petition for Review of Decision of The Tax Court of the United States (District of Georgia)

(August 13, 1957.)

Before RIVES and CAMERON, Circuit Judges, and DAWKINS, Sr., District Judge.

RIVES, Circuit Judge: This petition for review of a Tax Court decision[1] concerns the taxability of subsistence money received in lieu of meals during the year 1952 by a Georgia Highway Patrolman. His salary that year amounted to $2,152.50, whileh is subsistence payments came to $1,647.00.

The uniformed division of the Georgia Highway Patrol was organized on a military pattern by its first Director, Captain Carter, a former Captain of Cavalry in the United States Army. It has followed the same general pattern until the present time. When the Patrol was first organized, its members were paid $100.00 a month and their meals and lodging were furnished.

The Department of Public Safety soon found that it was financially costly, administratively impossible, and inefficient to continue feeding the men at some central place or at boarding houses. The present arrangement requires the members of the Highway Patrol to live in the barracks at their particular post.

In this case, Trooper Magness was a member of Troop "D"

1 Reported at 26 T.C. NO. 125 (1956).

of Post 32 at Athens, Georgia. He was subject to call twenty-four hours per day, every day of the year; it was necessary that his headquarters be advised of his whereabouts at all times, whether on duty or off duty; and the subsistence payments at the rate of $4.50 per day were paid to him for 366 days during 1952. Magness testified that on his off days and vacation days[2] he ate with his mothero n the family farm, otherwise, he ate at any public restaurant of his choice, except when actually on patrol. When on patrol, it was necessary that he eat at some restaurant on his route and that he report previous to doing so to his headquarters, telling them how he could be reached. He also testified that he was required to keep his headquarters constantly informed of how he could be contacted in case he was needed, but that he was never called during 1052 while on vacation or while on days off. He further testified that $4.50 per day was not enough to pay for his meals; that his bed linens, blankets and uniforms were furnished by the State, but that he had to furnish his own underwear and keep his other gear cleaned and shined

The basic question stated very simply, is "Were the subsistence payments income?" Petitioner addresses himself to this problem as there were nod ifference between situations where an employer furnishes his employee with quarters in kind, makes in kind or money in lieu of either.

The Regulations and administrative rulings from 1919 to the present tiine have excluded from income the value of meals furnished in kind for the convenience of the employer, probably upon the theory thatt hey should not be considered as compensation to the employee. Section 39.22(a)-3 of Treasury Regulations 118, promulgated under the internal Revenue Code of 1939, provides in part:

> " * * * If a person receives as compensation for services rendered a salary and in addition thereto living quarters or meals, the value to such person of the quarters and meals so furnished constitutes income

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2 15 days vacation plus 46 days off.

> subject to tax. If, however, living quarters or meals are furnished to employees for the convenience of the employer, the value thereof need not be computed and added to the compensation otherwise received by the employees."[3]

The Senate Committee, in studying Section 119 of the 1954 Code,[4] stated:

> "Section 119 applies only to meals or lodging furnishin kind. Therefore any cash allowances for meals or lodging received by an employee will continue to be includable in gross income to the extent that such allowances constitute compensation."[5]

The consistent difference in treatment administratively and by the Congress between meals furnished in kind for the convenience of the employer and money in lieu thereof in no way binds the courts, but it is entitled to their serious consideration.

The Constitution[6] gives the Congress the power to lay and collect taxes on incomes "from whatever source derived," words

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3 See also, T.D. 4965, 1940-1 Cum. Bull. 13; Sections 1.119-1 Fed. Tax Regulations, 1957; compare Section 1.120-1, Id.

4 "§119. *Meals or lodging furnished for the convenience of the employer*

"There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him by his imployer for the convenience of the employer, but only if—

"(1) in the mase of meals, the meals are furnished on the business premises of the employer, or

"(2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment.

"In determining whether meals or lodging are furnished for the convenience of the employer, the provisions of an employment contract or of a State statute fixing terms of employment shall not be determinative of whether the meals or lodging are intended as compensation." 26 U.S.C.A. §119.

5 Senate Report No. 1622, 83rd Cong., 2d Sess., pp. 19-20, 190-191; 3 U.S.C. Congresisonal and Administrative News (1954) 4621, 4649, 4825-4826

6 Sixteenth amendment

of enlargement indicating an intention that the meaning of "income" should be restricted.[7] Section 22(a) of the Internal Revenue Code of 1939 defines "gross income" to include, inter alia, "gains, profits, and income derived from salaries, warges, or compensation for personal service * * * of whatever kind and in whatever form paid * * *." This definition "is broad enough to include in taxable income any economic or financial benefit conferred on the employee as compensation, whatever the form or mode by which it is effected." *Commissioner v. Smith*, 324 U.S. 177, 181 (1945). Subsection (b) of Section 22 lists those items which shall not be included as a part of income. Sixteen items are listed and they do not include money provided to state employees with which to buy meals. In Section 22 (b) (13), an exclusion is listed which applies expressly to enlisted personnel and commissioned officers of the Armed Forces of the United States, but not until the Internal Revenue Code of 1954, by Section 120[8] thereof, was subsistence money of state highway patrolmen excluded from income. The House Committee Report and the Senate

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7 See Eisner v. Macomber, 252 U.S. 189, 207 (1920); 1 Mertens, Federal Income Taxation, §§5.01, 503; Magill, "Taxable Income", p. 67.

8 "§120. *Statutory subsistence allowance received by police*

"(a) *General rule.*—Gross income does not include any amount received as a statutory subsistence allowance by an individual who is employed as a police official by a State, a Territory, or a possession of the United States, by any political subdivision of any of the foregoing, or by the District of Columbia.

(b) *Limitations.*—

"(1) Amounts to which subsection (a) applies shall not exceed $5 per day.

"(2) If any individual receives a subsistence allowance to which subsection (a) applies, no deduction shall be allowed under any other provision of this chapter for expenses in respect of which he has received such allowance, except to the extent that such expenses exceed the amount excludable under subsection (a) and the excess is otherwise allowable as a deduction under this chapter." 26 U.S.C.A. §120.

Committee Report on this section were practically identical and stated that it was new legislation.[9]

Thus, we have the Congress, for the first time, making subsistence payments to state police officers excludable from income, but not effective until after December 31, 1953. Furthermore, as has been stated, there are no administrative rulings by the executive branch which would exclude such payments from income, and in the judicial branch only the Third Circuit in *Saunders v. Commissioner of Internal Revenue*, 215 F. 2d 768 (1954), and the Court of Claims in *Jones v. Unted States*, 60 Ct.Cl. 552 (1925), which will be discussed later, have ruled that such money might be excluded from income. On the other hand, the Commissioner and the Tax Court have held that such payments are income and taxable.[10]

This case is probably distinguishable from *Saunders v. Commissioner of Internal Revenue*, *supra*, inasmuch as (a) There it was conclusive that the $70.00 a month received by Saunders in lieu of rations was not intended as compensation, and, in fact, the Tax Court found that the rations allowance "was not regarded or accounted for as compensation, either in the State Police Budget or by the State Civil Service Commission." Here the Tax Court failed to find that the "subsistence payment" was intended as a reimbursement. In fact, the provision of the Georgia law providing for a subsistence allowance

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9 See Senate Committee Report on Internal Revenue Code of 1954, Part I, Sec. VII, K; U.S.C. Congressional and Administrative News 4621, 4649:

"K. *Subsistence Payments to State Police Officers* (sec. 120)

"(1) House changes accepted by committee.

"The House and your committee's bill provide an exclusion from gross income not to exceed $5 a day, for subsistence allowances paid to officers of a police department of a State, Territory, the District of Columbia, or a possession. *There is no comparable existing law.* It is believed that this exclusion is desirable because State police officers are required to make frequent trips away from their posts of duty. Under present law these expenses cannot be deducted if the police officer is to use the standard deduction." (Emphasis added.)

10 See Hyslope v. Commissioner, 21 T.C. 131; Saunders v. Commissioner, 21 T.C. 630; and this case, Magness v. Commissioner, 26 T.C. 982.

is found in Section 92-A-209 of 27 Code of Georgia Annotated, entitled "Same, Personnel, Officers' *Salaries*" (Emphasis is supplied), and not in Section 92-A-237 entitled "Allowance for Board and Quarters." (b) Saunders received $70.00 per month to pay for meals while actually on patrol, and he was required to eat at a place on his route at a particular time. Magness, on the other hand, received $4.50 per day every day of the year, even while on vacation or on days off, and, except for the time when he was actually on patrol, could eat at any place he chosefl When he was on patrolthe only requirement was that he notify his headquarters where he could be reached while he was eating. He testified that, while he was off duty, he could do anything he wanted to provided he notified his headquarters that they could get in touch with him in case of an emergency.

The *Jones* case, *supra*, heavily relied on by the Third Circuit in *Saunders*, *supra*, and by petitioner here was distinguished in *Robert H. Saunders*, 21 T.C. 630 (1954);*Charles H. Hyslope* 21 T.C. 131; and *Gunnar Van Rosen*, 17 T.C. 834, 839-840 (1951), as follows:

> "While the *Jones* case is authority for the xeclusion from gross income by military personnel of cash allowances made to them for subsistence and quarters, it does not, in our opinion, require or justify an extension of the rule therein to similar allowances made to civilian personnel."

Further, the *Jones* case presented the peculiar situation wherein the United States, with one hand, as an employer, gives money to its employees, and with the other hand, as a tax collector, takes it back; whereas, a state is in the same position as any other employer so far as federal income tax obgligations of its employees are concerned.

Moreover, while we accord great weight to the holding of the Third Circuit, we differ from it as to the meaning and application of Section 39.22 (a)-3 of Treasury Regulation

118. *Saunders* admitted that the payment of cash to an employee is mainly compensatory and probably more obviously so that a payment in kind. Nevertheless, it was stated,

> "In the instant case, cash was furnished Saunders in advance for a particular purpose, viz., payment for meals, and it is an established fact that the entire amount furnished was so expended but it does not automatically follow that the cash received was compensation."

Saunders v .Commissioner of Internal Revenue, *supra*, at pp. 771-772. By finding some special cases in which cash thus received was held by the Treasury Department not to be compensation,[11] and relying heavily on *Jones v. United States*, 60 Ct.Cl. 552 (1925), it was able to apply the administrative ruling to situations in which money was furnished. Magness now asks us to extend that application to situations in which money is furnished to buy meals indiscriminately while on duty and while off duty and on vacation.

Under familiar and often recognized rules of construction,[12] we conclude that we should not do so but should, on this occasion, agree with the reasoning of the Tax Court. Its decision is therefore

AFFIRMED

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11 O.D. 11, 1 Cum.Bull. 66 (1919). American Red Cross employee receiving cash for maintenance but no pay. Only amount actually unused for expenses need be returned. O.S. 514, 2 Cum.Bull. 90 (1920). Supper money furnished an employee after regular working hours.

12 Commissioner v. LoBue, 351 U.S. 243, 246 (1956); Commissioner v. Glenshaw Glass Co., 348 U.S. 426 (1955); Commissioner v. Jacobson, 336 U.S. 28, 48-49 (1949); Commissioner v. Smith, 324 U.S. 177, 181 (1945); Helvering v. Clifford, 309 U.S. 331, 334 (1940); White v. United States, 305 U.S. 281, 292 (1938); Helvering v. Midland Mutual Life Ins. Co., 300 U.S. 216, 223 (1937); Douglas v. Willcuts, 296 U.S. 1, 9 (1935); New Colonial Ice Co. v. Helvering, 292 U.S. 435, 440 (1934); Irwin v. Gavit, 268 U.S. 161, 166 (1925); Yazoo & Mississippi Valley R. Co. v. Campbell, 181 F. 2d 451, 457 (7th Cir. 1950).

APPENDIX "B"

Harold Brannon Magness, versus Commissioner of Interal Revenue, No. 16.430, U. S. Court of Appeals, Fifth Circuit.

This cause came on to be heard on the petition of Harold Brannon Magness, for review of the decision of the Tax Court of the United States, and was argued by counsel; On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decision of the said Tax Court in this case be, and the same is hereby affirmed.

Extract from the minutes of the Judgment, of August 13th, 1957.

Order denying rehearing. Extract from the minutes of September 30th, 1957.

Harold Brannon Magness vs. Commissioner of Internal Revenue, No. 16.420, United States Court of Appeals, Fifth Circuit.

"It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied."

APPENDIX "C"

MOTION FOR STAY OF MANDATE

Filed October 11, 1957 in the United States Court of Appeals, Fifth Circuit. Harold Brannon Magness, Appellant, versus Commissioner of Internal Revenue, Appellee. Case No. 16-430.

Now comes Harold Brannon Magness, appellant herein, by and through his attorney of record, Jas. W. Arnold, and within the time prescribed by law, and being dissatisfied with the decision rendered against him in the foregoing case by this Hon. Court desires to make application for certiorari, in order that said case may be heard in the Supreme Court of the United States: and due to the constant attendance of said Jas. W. Arnold upon the State Courts of Georgia, beginning Monday, October 14th, 1957, and continuously thereafter through November, 1957, and then upon the United District Court which convenes in Athens, Georgia, December 2nd, 1957, and until said court is adjourned; prays from this Hon. Court, an order, extending the time by which said attorney may perfect and prepare the said application for certiorari to ninety days or to January 1st, 1958, and that the mandate herein may be stayed until such time as the Courts may hear and dtermine said certiorari.

Respectfully submitted,
/s/ JAS. W. ARNOLD
James W. Arnold, Attorney of
Record Herein.

ORDER STAYING MANDATED

Filed October 14, 1957, in the United States Court of Appeals for the Fifth Circuit.

Harold Brannon Magness, Appellant, versus Commissioner of Internal Revenue, Appellee. No. 16,430.

IN CONSIDERATION OF THE APPLICATION of the

petitioner in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable him to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this court in said cause be and the same is stayed for a period of ninety days from September 30, 1957; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within ninety days from September 30, 1957 there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of ninety days from September 30, 1957, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

DONE AT NEW ORLEANS, LA., this 12th day of October, 1917.

/s/ RICHARD T. RIVES
United States Circuit Judge

CLERK'S CERTIFICATE
UNITED STATES OF AMERICA
UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

I, EDWARD W. WADSWORTH, Clerk of the United States Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 98 to 124, next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 16430, wherein Harold Brannon Magness, is petitioner, and Commissioner of Internal Revenue, is respondent, as full, true, complete as the original of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 97 are identical with the printed record upon which said cause was heard and decided in the said Court of Appeals.

In testimony whereof, I hereunto, subscribe my name and affix the seal of the said United States Court of Appeals at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 16th day of October, A. D., 1957.

EDWARD W. WADSWORTH
Clerk of the United States Court of Appeals
for the Fifth Circuit
By Gilbert F. Gamcheau, Deputy Clerk

APPENDIX "D"

The jurisdiction of the Supreme Court of the United States is invoked here under 28 U.S.C. 1254 (1), Internal Revenue Code 1954, Sec; 7482, and under U.S.C.A., Title 26 Sec. 1141 (a), "The Circuit Court of Appeals, and the United States Court of Appeals for the District of Columbia shall have exclusive jurisdiction to review the decisions of the Board, except as provided in section 239 of the Judicial Code, as amended, 43 Stat 938, (U.S.C. Title 28 Sec 346); And the judgment of any such Court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 240 of the Judicial Code, as amended, 43 Stat 938 (U.S.C. Title 28, Sec. 347).

The United States Court of Appeals, Fifth Circuit had jurisdiction to hear and determine on review the decision of the Tax Court of the United States in Case Docket #55503, pursuant to U.S.C.A. Title 26 Section 1141 (b) of the Internal Revenue Code 1939, because, petitioner having made and filed his income tax returns for the taxable year (1952) involved, in the office of the Collector of Internal Revenue for Georgia, Athens, Georgia.

APPENDIX "E"

GEORGIA STATUTES AND REGULATIONS INVOLVED:

The Department of Public Safety of Georgia was created by an Act of the Georgia Legislature at the January-February Session, 1937, was approved and became a law March 19, 1937, being Act No. 220 of that session. Acts 1937 pages 322-355.

In the preamble of the Act it is stated as follows: Acts 1937, page 322. "To create a Uniform Division known as the Georgia State Patrol; To provide rules and regulations for the operation and control of the Uniform Division known as the Georgia State Patrol; To fix the ages of enlistment, re-enlistment, and retirement of members of the Uniform Division; To provide for recruiting, training, promotion, and discharge of the members of the Uniform Division; To provide punishment for withdrawal by a member without consent; To provide for furnishing quarters, offices, supplies and equipment; To provide for Headquarters Staff, and for each District or Division thereof; To provide for furnishing QUARTERS, MEALS AND LODGING FOR THE MEMBERS OF THE UNIFORM DIVISION; To provide for the creation of Districts or Divisions, Headquarters, etc."

Section 3 of Article 1 of that Act provided; The Department of Public Safety as herein created shall appoint a person to be known as the Commissioner of Public Safety in Georgia, who shall be the highest ranking officer in the Uniform Division of the Georgia State Patrol, and who shall under the direction of the Department of Public Safety, exercise supervision and control over all the Divisions and employees of the Department of Public Safety. Prescribing his salary, term of office, qualifications, duties, method of removal, etc., and providing for a deputy commissioner. Acts 1937, pages 325-326.

In 1934, Acts 1943, pages 196-201, the foregoing Act was amended by changing the name of Commissioner of Public

Safety and Deputy Commissioner of Public Safety to Director of Public Safety and Deputy Director of Public Safety.

Section 5 of Article 2 of that Act provided: That it would be a misdemeanor for any officer or trooper to withdraw from service in the Uniform Division, without written application approved by the Director of the Department of Public Safety. Acts 1937 page 333.

Sec. 11, Article 2 of that Act provided; That the Director is authorized, with the approval of the Department of Public Safety; To provide for comfortable barracks for the officers and troopers of the Uniform Division of the Department of Public Safety at such Districts or Divisions, etc.; To provide for SERVING MEALS at such barracks, and for the upkeep and maintenance of same. Acts 1937 pages 322-335. And until adequate barracks with proper facilities for furnishing MEALS are secured, all officers and troopers shall be given a proper allowance for MEALS as lodging. Acts 1937, pages 322-336.

Under the Act of 1943 (Amendment) it was provided; That all members of the Uniform Division of the Department of Public Safety shall be paid a subsistence allowance of not less than $2.50 per diem. Acts 1943 pages 196-201.

In 1951 the Georgia Legislature amended the Act of 1937, and all ammendatory Acts thereto as follows: 1. By increasing the salaries of all enlisted men of the Uniform Division; 2. By increasing the allowance of subsistence to officers and troopers alike to not less than $4.00 per day and not more than $5.00 per day, providing; "That said subsistence is hereby made mandatory in the sum of not less than $4.00 per day and not more than $5.00 per day; and shall be in addition to all salaries and/or compensation." Acts 1951, page 636, approved and became the law February 21, 1951.

FILED
JAN 15 1958

No. 672

In the Supreme Court of the United States

OCTOBER TERM, 1957

HAROLD BRANNON MAGNESS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 80–85)[1] are reported at 26 T. C. 981. The opinion of the Court of Appeals (Pet. 12–18) is reported at 247 F. 2d 740.

JURISDICTION

The judgment of the Court of Appeals was entered on August 13, 1957. (Pet. 19.) Petitioner's motion for rehearing was denied on September 30, 1957. (Pet. 19.) The petition for a writ of certiorari was filed on December 16, 1957. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

[1] Record references are to the record in the court below.

QUESTION PRESENTED

Whether a subsistence allowance received by taxpayer, a state trooper, from the State of Georgia in the form of cash to defray the cost of his meals for every day of the year, regardless of whether he was on active duty, and whereby he could purchase his meals at any public restaurant of his choice, was additional compensation to him includible in his gross income under Section 22 (a) of the Internal Revenue Code of 1939.

STATUTES AND OTHER AUTHORITIES INVOLVED

The pertinent provisions of the applicable statutes and other authorities are set forth in the Appendix, *infra*, pp. 10–18.

STATEMENT

The relevant facts as found by the Tax Court (R. 81–82), and by the Court of Appeals (Pet. 12–13), may be summarized as follows:

During 1952, taxpayer was a highway patrolman with the Georgia Department of Public Safety. His station was in the City of Athens, Georgia, a distance of approximately twenty-five miles from his home. (R. 81.)

As a member of the State Patrol, taxpayer was required to live in a barracks in Athens and was subject to call twenty-four hours a day, every day in the year. He was entitled to a twenty-four hour pass one day each week, and to a two week vacation each year. When off duty he was required to advise his headquarters of his whereabouts at all times. (R. 81.)

In addition to his regular salary, taxpayer received in every pay check an amount denominated as subsistence. Such amount was paid to him at the rate of $4.50 per day for every day of the year regardless of whether or not he was on active duty. This amount of subsistence was paid to members of the State Patrol to defray the cost of their meals. Patrolmen, including taxpayer, purchased their meals at any public restaurant of their choice along the route of their patrol duty. They could eat at any time they chose while on duty but were required to notify their headquarters of their exact whereabouts. (R. 81–82.)

During 1952, taxpayer received a total of $1,647 for *per diem* subsistence, which he did not report as income. The Commissioner determined that such an amount constituted additional taxable compensation to him. (R. 82.) The Tax Court upheld the Commissioner's determination (R. 82–85), and the Court of Appeals affirmed (Pet. 12–18).

ARGUMENT

1. The decision below is correct. Taxpayer, who was single, received a financial benefit from the money paid to him for subsistence and for which he otherwise would have had to spend his own funds. These payments—made for every day of the year, whether taxpayer was on duty status, on leave, or on vacation—were paid in the same manner as his salary, and were intended to constitute remuneration for the services performed by him as a state trooper to the same extent as was his salary. As the court below noted (Pet. 16–17), when the Georgia Laws (1951) 635,

Section 1, were enacted to provide for subsistence to be paid in the form of cash as an addition to salaries and/or compensation, this provision was included in the Code of Georgia Annotated under Section 92A-209 (Appendix, *infra*, pp. 15–16), entitled, "Same; personnel; officers; salaries", and not under Section 92A-237 (Appendix, *infra*, p. 18), entitled, "Allowance for board and quarters". Accordingly, it is clear that these cash payments constitute "gains, profits, and income derived from salaries, wages, or compensation for personal service" within the broad definition of income contained in Section 22 (a) of the Internal Revenue Code of 1939 (Appendix, *infra*, p. 10). *Commissioner* v. *LoBue*, 351 U. S. 243, 246; *Commissioner* v. *Glenshaw Glass Co.*, 348 U. S. 426, 429–430; *Commissioner* v. *Smith*, 324 U. S. 177, 181.

Furthermore, the cash subsistence payments are not excludible from taxpayer's income. Although, as the court below pointed out (Pet. 15), Congress in Section 22 (b) of the 1939 Code (26 U. S. C. 1952 ed., Sec. 22) has listed some sixteen items which are excludible from tax, there is no provision which explicitly excludes amounts received for subsistence. Since the exclusions from income by Section 22 (b) are to be strictly construed, a taxpayer claiming the benefit of any particular exclusion must clearly come within the specific categories set forth by Congress. *Commissioner* v. *Jacobson*, 336 U. S. 28, 49; *Helvering* v. *Northwest Steel Mills*, 311 U. S. 46, 49. Instead, in the present case, it is clear that the cost of taxpayer's meals, which is similar to the costs incurred by most employed individuals who are required because

of the nature of their employment to eat at least one meal a day away from their residences in the vicinity of where they are employed, is a personal or living expense, the deductibility of which is expressly prohibited by Section 24 (a) (1) of the 1939 Code (Appendix, *infra*, p. 10).

2. There is no merit to taxpayer's contention (Pet. 7, 16) that the cash amounts paid to him are excludible from gross income under the so-called "convenience of the employer" rule, which excludes from income the value of living quarters and meals furnished in kind for the convenience of the employer. Section 39.22 (a)–3 of Treasury Regulations 118 (Appendix, *infra*, pp. 11–12). In the first place, as the Regulations and Mim. 6472, 1950–1 Cum. Bull. 15 (Appendix, *infra*, pp. 12–14) point out, if living quarters or meals furnished to a person constitute compensation for services rendered, the value of such living quarters or meals is taxable regardless of whether they were furnished for the convenience of the employer. In the present case, the subsistence amounts paid to taxpayer clearly constituted compensation to him. Second, Section 39.22 (a)–3 permits an exclusion only where the living quarters or meals are furnished to the employee in kind. In the present case, there is no dispute that taxpayer did not receive his meals in kind. (R. 26, 51.) Third, the decisions and rulings which have permitted certain taxpayers to exclude from their gross income living quarters or meals furnished in kind have done so upon the sole ground that such an employee could not otherwise perform the services required of him. Thus, if

the employee's duties were such that he could perform them without being required to eat his meals at the particular place selected by his employer, i. e., he could purchase his own meals, then the payment of cash subsistence or the furnishing of meals would also be for the convenience of the employee and not solely for the convenience of the employer, and would not be excludible from the employee's income. *Commissioner* v. *Moran*, 236 F. 2d 595 (C. A. 8th); *Commissioner* v. *Doak*, 234 F. 2d 704 (C. A. 4th); *United States* v. *Briggs*, 238 F. 2d 53 (C. A. 10th); *Van Rosen* v. *Commissioner*, 17 T. C. 834; *Hyslope* v. *Commissioner*, 21 T. C. 131; *Drill* v. *Commissioner*, 8 T. C. 902; *Osteen* v. *Commissioner*, 14 T. C. 1261; Mim. 6472, *supra*. See *Commissioner* v. *Flowers*, 326 U. S. 465, 473. Here, the cash payments were not made solely for the convenience of taxpayer's employer—these payments included all meals whether or not taxpayer was on duty, on leave, or on vacation. (R. 51.) Except when actually on patrol taxpayer could eat at any place he chose, and while on patrol the only limitation placed upon him was that he eat somewhere along his patrol route. (R. 30, 48, 50–51, 69.) This is not different from the situation of most employed persons.

Contrary to taxpayer's contention (Pet. 2, 7), and as the court below properly noted (Pet. 16–17), there is no conflict between the decision below and *Saunders* v. *Commissioner*, 215 F. 2d 768 (C. A. 3d). In the first place, in *Saunders* the Tax Court found (21 T. C. 630, 632), and the Court of Appeals relied upon (pp. 771, 773–774), the fact that the amount paid in lieu of rations was not regarded or accounted for as compen-

sation. On the other hand, in the present case not only was there no finding that the payments here involved were intended only as reimbursement for subsistence, but the record supports the conclusion that they were intended to constitute compensation. (See Pet. 16–17.) Second, in *Saunders* payment was made only for actual days on duty; and vacation and days on leave were specifically excluded, whereas in the present case payment was made in the same manner as salaries, regardless of whether taxpayer was on or off duty status. Third, in *Saunders* there were orders prescribing the time and place for eating meals, whereas no such orders appeared to have been issued in the present case.

3. Taxpayer's contention (Pet. 7–8, 9–11) that the cash payments for subsistence received by him are excludible from his income under the provision of Section 39.22 (a)–3 of Treasury Regulations 118, *supra*, relating to the value of quarters furnished to officers, warrant officers, and enlisted men in the armed services of the United States, or the Coast Guard, the Coast and Geodetic Survey and the Public Health Service, or amounts received as commutation of quarters, is erroneous. Although the decision of *Jones* v. *United States*, 60 C. Cls. 552, 566, is authority for the exclusion from gross income by military personnel of the United States of cash allowances made to them for subsistence and quarters,[2] this decision is limited

[2] As pointed out in *Jones*, *supra*, pp. 565–566, there had been a long-standing distinction between salary or compensation, and quarters or allowances for quarters furnished to certain persons in the service of the United States. In the face of this

to the specifically named groups and should not be extended to cover allowances made to civilian personnel. *Van Rosen* v. *Commissioner, supra,* pp. 839–840; *Hyslope* v. *Commissioner, supra,* p. 133; *Saunders* v. *Commissioner,* 21 T. C. 630, 634. Cf. *Saunders* v. *Commissioner,* 215 F. 2d 768 (C. A. 3d).

In the present case, neither quarters or commutation of quarters nor a person in one of the enumerated services of the United States is involved. Accordingly, there is no conflict between the decision below and *Jones* v. *United States, supra.*

4. The issue lacks substantial importance. By Section 119 of the Internal Revenue Code of 1954 (26 U. S. C. 1952 ed., Supp. IV, Sec. 119) Congress permitted the exclusion from gross income of the value of meals or lodging furnished an employee by his employer if such meals or lodging are furnished at the place of employment and if the employee is required to accept such meals or lodging at the place of employment as a condition of his employment. By Section 120 of the 1954 Code (26 U. S. C., 1952 ed., Supp. IV, Sec. 120) Congress authorized the exclusion of an amount not to exceed $5 per day received as statutory subsistence by a police officer of a state. It would appear that the 1954 Code provisions, and particu-

distinction, Congress in early income tax statutes levied the tax not only upon salaries but also upon payments to persons in the civil, military, or other employment or service of the United States. When Congress in later Revenue Acts omitted such payments from its description of what was subject to tax, this would indicate that Congress did not intend to have such payments included in gross income.

larly Section 120, would settle for the future the question raised in the present case.[3]

CONCLUSION

The decision below is correct and is not of general importance. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1958.

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[3] The court below properly held (Pet. 13–14, 15–16) that Sections 119 and 120 were not made retroactive to taxable years beginning before January 1, 1954, and that the legislative history of these provisions clearly reveals that Congress had intended these provisions to be new legislation and not to authorize such relief under the 1939 Code. See H. Rep. No. 1337, 83d Cong., 2d Sess., pp. 18, A38–A40; S. Rep. No. 1622, 83d Cong., 2d Sess., pp. 19–20, 190–191; H. Conf. Rep. No. 2543, 83d Cong., 2d Sess., pp. 26–27.

APPENDIX

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

(a) [As amended by Section 1 of the Public Salary Tax Act of 1939, c. 59, 53 Stat. 574] *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * *

(26 U. S. C. 1952 ed., Sec. 22.)

SEC. 24. ITEMS NOT DEDUCTIBLE.

(a) [As amended by Section 127 (b) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *General Rule.*—In computing net income no deduction shall in any case be allowed in respect of—

(1) Personal, living, or family expenses, except extraordinary medical expenses deductible under section 23 (x);

* * * * *

(26 U. S. C. 1952 ed., Sec. 24.)

Treasury Regulations 118, promulgated under the Internal Revenue Code of 1939:

> Sec. 39.22(a)–1. *What included in gross income.* (a) Gross income includes in general compensation for personal and professional services, business income, profits from sales of and dealings in property, interest, rent, dividends, and gains, profits, and income derived from any source whatever, unless exempt from tax by law. * * * In general, income is the gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets. * * *
>
> * * * * *
>
> Sec. 39.22(a)–3. *Compensation paid other than in cash.* If services are paid for with something other than money, the fair market value of the thing taken in payment is the amount to be included as income. If the services were rendered at a stipulated price, in the absence of evidence to the contrary such price will be presumed to be the fair value of the compensation received. If a corporation transfers to its employees its own stock as compensation for services rendered by the employee, the amount of such compensation to be included in the gross income of the employee is the fair market value of the stock at the time of the transfer. If a person receives as compensation for services rendered a salary and in addition thereto living quarters or meals, the value to such person of the quarters and meals so furnished constitutes income subject to tax. If, however, living quarters or meals are furnished to employees for the convenience of the employer, the value thereof need not be computed and added to the compensation otherwise received by the employees. The value of quarters furnished to the commissioned officers, chief warrant officers, warrant officers, and enlisted personnel of the Army, Navy, Air Force, Coast

Guard, Coast and Geodetic Survey, and Public Health Service, or amounts received by them as commutation of quarters, are to be excluded from gross income. See also section 22 (b) (6). Premiums paid by an employer on policies of group life insurance covering the lives of his employees, the beneficiaries of which are designated by the employees, are not income to the employees. See § 39.24(a)–3.

Mim. 6472, 1950–1 Cum. Bull. 15:

1. Section 22(a) of the Internal Revenue Code defines gross income as including "gains, profits, and income derived from salaries, wages, or compensation for personal service * * * of whatever kind and in whatever form paid, * * *" Section 29.22 (a)–3 of Regulations 111, relating to compensation paid other than in cash, provides in part as follows:

> * * * If a person receives as compensation for services rendered a salary and in addition thereto living quarters or meals, the value to such person of the quarters and meals so furnished constitutes income subject to tax. If, however, living quarters or meals are furnished to employees for the convenience of the employer, the value thereof need not be computed and added to the compensation otherwise received by the employees. * * *

Similar language is contained in section 405.101 of Regulations 116, relating to wages subject to withholding of income tax at the source.

2. The first sentence of the above-quoted regulation adheres closely to the definition of gross income included in section 22(a) of the Internal Revenue Code and establishes the general rule that every person receiving living quarters or meals "as compensation for services rendered" must include in gross income the value to him of such quarters or meals. The second sentence

quoted above must be construed in the light of the first sentence to avoid being inconsistent therewith and to prevent violation of the statutory definition of gross income. The "convenience of the employer" rule is simply an administrative test to be applied only in cases in which the compensatory character of such benefits is not otherwise determinable. It follows that the rule should not be applied in any case in which it is evident from the other circumstances involved that the receipt of quarters or meals by the employee represents compensation for services rendered. This position is in accord with I.T. 2692 (C.B. XII–1, 28 (1933)) and the decision of the United States Board of Tax Appeals (now The Tax Court of the United States) in *Herman Martin* v. *Commissioner* (44 B.T.A. 185).

3. For example, a State civil service employee is employed at an institution in which the conditions of employment require him to live at the institution and be available for duty at any time. In connection with his employment, he is furnished living quarters and meals. Under the applicable State statute, the civil service rules and regulations of the State, or the individual contract of employment, the value of the living quarters and meals is considered as part of the employee's compensation. Regardless of whether living quarters and meals are furnished in addition to the cash salary, or the value thereof is deducted from the total salary established for the particular position, it is evident that the living quarters and meals are furnished as compensation for services rendered. Consequently, the value of the living quarters and meals is includible in his gross income and is subject to withholding of income tax at the source by the employer, notwithstanding the fact that the employee is required to live at the institution and be available for duty at any time.

4. Mimeograph 5023 (C. B. 1940–1, 14) and Mimeograph 5657 (C. B. 1944, 550) are hereby

modified to the extent they imply that the "convenience of the employer" rule is applicable to situations in which it is otherwise evident that living quarters or meals are furnished to an employee as compensation for services rendered. Similarly, O. D. 265 (C. B. 1, 71 (1919)), O. D. 814 (C. B. 4, 84 (1921)), O. D. 915 (C. B. 4, 85 (1921)), and I. T. 2253 (C. B. V–1. 32 (1926)) should not be relied upon as precedents in any case in which living quarters or meals are determined to be compensatory without reference to the "convenience of the employer" rule.

5. Under the authority contained in section 3791 (b) of the Internal Revenue Code, the provisions of this mimeograph will be applied without retroactive effect from January 1, 1949, in cases in which living quarters or meals are determined to be compensatory without reference to the "convenience of the employer" rule, except that any taxes which have been withheld or paid on the value of such living quarters or meals will not be refunded.

6. Correspondence relating to this mimeograph should refer to its number and the symbols IT:EIM.

GEO. J. SCHOENEMAN,
Commissioner.

Approved February 15, 1950.

THOMAS J. LYNCH,
Acting Secretary of the Treasury.

27 Code of Georgia Annotated and 1956 Supplement:

92A-201. *Creation.*—There is hereby created and established a division of the Department of Public Safety to be known as the Uniform Division, the members of which shall be known and designated as the Georgia State Patrol, and who shall wear a distinctive uniform and equipment to be prescribed by the Director of

Public Safety, and provided by the Department of Public Safety. (Acts 1937, pp. 322, 328; 1943, pp. 196, 201.)

92A-204. *Same; salaries.*—The salaries of the headquarters staff shall be on the same scale, and payable at such times as those of similar rank herein named. (Acts 1937, pp. 322, 328; 1943, pp. 196, 201; 1952, pp. 129, 130; 1955, pp. 298, 300; 1956, pp. 573, 574.)

92A-209. *Same; personnel; officers; salaries.*—One battalion of not more than 350 officers and men, in the discretion of the Director of Public Safety with the approval of the Department of Public Safety, which battalion as instituted, shall be composed of the following personnel, including the Commanding Officer and Treasurer herein named; said battalion to include not more than the following number of officers and non-commissioned officers with salaries as herein stated, payable monthly;

1 major	at $3,600	per year, each
5 captains	at $3,000	per year, each
8 1st lieutenants	at $2,600	per year, each
2 sergeant majors	at $2,500	per year, each
35 sergeants	at $2,400	per year, each
35 corporals	at $2,100	per year, each
All troopers	at $1,800	per year, each

Said salaries to be increased by the Director of Public Safety, with the approval of the Board of Public Safety, not more than five per cent. annually, for the first five years of enlistment; said five per cent. to be figured on base pay as set forth in this Act: Provided, however, the said salaries shall be maintained within the appropriation made by law. The provisions of this section granting an increase in salary of $25 per month, shall also apply to the members of the Georgia Bureau of Investigation.

Subsistence allowances shall be not less than $4 per day for troopers and officers. Said subsistence allowance is hereby made mandatory in the sum of not less than $4 per day and not

more than $5 per day, and shall be in addition to all salaries and/or compensation. (Acts 1937, pp. 322, 329; 1939, pp. 135, 136; 1943, pp. 196, 201; 1946, pp. 39, 40; 1947, pp. 1159, 1160; 1952, pp. 129, 131; 1955, pp. 298, 301; 1956, pp. 573, 575.)

92A-212. *Recruits.*—The Director of Public Safety is authorized to employ the number of recruits as may be necessary, who shall not be members of the Uniform Division, and the Director shall prescribe the rules and regulations governing the training and enlistment of such recruits, subject to the approval of the Board of Public Safety. (Acts 1949, pp. 70, 75; 1952, pp. 129, 132; 1955, pp. 298, 302; 1956, pp. 573, 576.)

92A-221. *Reappointment.* — All the officers and troopers, excepting the Director and Deputy Director of the Department of Public Safety, shall be enlisted to serve until retirement, subject to removal by the Director of Public Safety for cause after charges preferred and a hearing granted before the State Patrol Disciplinary Board, which Board shall be composed of the Director, the commanding officer, a captain, a lieutenant, a sergeant, a corporal, and a trooper. * * * (Acts 1949, pp. 70, 76.)

* * * * *

92A-224. *Enlistment; examination; training.*—It shall be the duty of the Director of the Department of Public Safety, subject to the laws of this State, to arrange for the enlistment and examination of applicants for service as troopers or officers of the Uniform Division of the Department of Public Safety, to provide the necessary preliminary training and subsequent instruction of troopers and recruits as peace officers of this State, and to make all necessary rules and regulations for the discipline, conduct and control of all officers, troopers and other employees of the Department of

Public Safety. (Acts 1937, pp. 322, 333; 1943, pp. 196, 201.)

92A-209. *Same; personnel; officers; salaries.*—The Director of the Department of Public Safety shall, within the limit of the appropriation, provide the members of the Uniform Division of the Department of Public Safety with proper uniforms, suitable to the season, and also with emergency and first aid outfits, weapons, horses, horse equipment, motor vehicles with radio equipment, if such be available, and all other necessary supplies and equipment for the purpose of carrying out the provisions of this Chapter, the same to remain the property of the State of Georgia. (Acts 1949, pp. 70, 77.)

92A-232. *Districts or divisions of the State.*—The Director of the Department of Public Safety with the approval of the Department of Public Safety, is authorized to divide the State of Georgia into districts or divisions, as may be necessary for the purpose of effectually patrolling the public roads and highways of this State and of the counties thereof, and for combating, detecting and preventing crime. (Acts 1937, pp. 322, 335; 1943, pp. 196, 201.)

92A-233. *Barracks; garages; stables; meals; cooks; allowance for expenses.*—The Director is authorized with approval of the Department of Public Safety to provide comfortable barracks and quarters for the officers and troopers of the Uniform Division of the Department of Public Safety at such districts or divisions. The Director of the Department of Public Safety shall also provide proper garages and storage places for all motor equipment and other equipment, for stabling of horses, and to provide for serving meals at such barracks or quarters and for the upkeep and maintenance of the same, to employ the necessary male cooks and servants, who need not be members of the Uniform Division, and whose compensation shall be fixed

in accordance with the rates prevailing at the place of employment, and who shall be subject to discharge at the pleasure of the commanding officer of the district or division. All members of the Uniform Division of the Department of Public Safety shall be paid a subsistence allowance of not less than $2.50 per diem, and when any officer or trooper is on duty away from his district or division he shall be allowed his proper expense for meals and lodging. (Acts 1937, pp. 322, 335; 1943, pp. 196, 201; 1946, pp. 39, 41.)

92A-237. *Allowance for board and quarters.*—The board and quarters herein provided shall be furnished to each and every member of the Uniform Division of the Department of Public Safety on active duty. Until adequate barracks or quarters with proper facilities for furnishing meals are secured for the headquarters staff, all officers and troopers shall be given a proper allowance for meals and lodging. (Acts 1937, pp. 322, 336; 1943, pp. 196, 201; 1945, pp. 117, 119.)

92A-239. *Duties of State Patrol.*—It shall be the primary duty of the Uniform Division of the Department of Public Safety to patrol the rural and public roads and highways throughout this State, to prevent, detect and investigate criminal acts, and to arrest and apprehend those charged with committing criminal offenses appertaining thereto, and to safeguard the lives and property of the public. (Acts 1937, pp. 322, 337.)

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